SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER,

vs.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from district court of the United States, District of Connecticut	1	1
Case 3360, Law		
Complaint	1	1
Defendant's motion to dismiss	8	5
Memorandum of decision on defendant's motion to dismiss	9	6
Order overruling defendant's motion to dismiss	16	10
Answer	17	10
Plaintiff's reply	19	12
Stipulation waiving trial by jury	20	12
Motion for judgment	21	13
Opinion of Judge Hincks	26	16
Defendant's request for findings of fact and conclusions of law	56	36
Judgment	64	41
Certificate of probable cause	66	42
Order on findings of fact and conclusions of law	68	43
Order extending time for filing bill of exceptions	69	43

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 28, 1933

Case 3371, Law

	Original	Print
Complaint	70	44
Defendant's motion to dismiss; note, re	77	48
Order overruling defendant's motion to dismiss	77	49
Answer	78	49
Plaintiff's reply	80	51
Stipulation waiving trial by jury; note, re	81	51
Defendant's request for findings of fact and conclusions of law; note, re	81	51
Motion for judgment	81	51
Judgment	86	54
Certificate of probable cause	88	55
Order on findings of fact and conclusions of law	90	56
Order extending time for filing bill of exceptions; note, re	90	57

Case 3421, Law

Complaint	91	57
Defendant's motion to dismiss; note, re	97	61
Order overruling defendant's motion to dismiss	98	61
Answer	99	61
Plaintiff's reply	101	63
Stipulation waiving trial by jury; note, re	102	63
Defendant's requests for findings of fact and conclusions of law; note, re	102	63
Motion for judgment	102	64
Judgment	107	67
Certificate of probable cause	109	68
Order on findings of fact and conclusions of law	111	69
Order extending time for filing bill of exceptions; note, re	111	69

Appeal Papers in Cases 3360, 3371, 3421, Law

Petition for appeal	112	69
Order allowing appeal	113	70
Citation and service (omitted in printing)	115	
Order consolidating cases for appeal	117	71
Order for withdrawal of exhibits for circuit court of appeals	118	71
Order approving defendant's narrative form bill of exceptions	120	72
Defendant's narrative form bill of exceptions	121	72
Caption	121	72
Appearances	122	73
Statement to jury	122	73
Testimony of William T. Morris	123	74
F. R. Baker	139	85
Fred B. Alger	144	88

	Original	Print
Testimony of Henry H. Heitmann	145	89
Henry A. Steeves	150	92
R. L. Morton	152	94
Maurice Walter	156	97
William A. Palmer	162	101
George Schlissel	165	103
Frank M. Hutchinson	167	104
Ebbe Carlson	169	106
Louis D. Christy	171	107
Charles G. Keller	173	108
Louis D. Christy (recalled)	174	109
Royal B. Dean	174	110
William Heaney	175	111
Charles A. Kellogg	177	112
A. L. Lundquist	178	112
William A. Ahern	183	116
Donald B. Howard	184	117
William J. Anthony	194	124
William F. Cotter	195	125
Daniel M. Herztfield	197	126
John J. Hine	200	128
Arthur C. Storz	201	129
Harold W. Falls	210	135
William D. Kirkpatrick	218	140
William E. Wissler	229	148
Leona E. Dilger	240	155
Walter J. Kretlow	243	158
George B. Kutz	251	163
William Parrish	257	167
Frank O. Blackley	261	170
Harry B. Page	262	171
Patrick Gallagher	263	171
William F. Cotter (recalled)	267	174
Harry O. Mainzinger	272	178
Walter M. Cusack	281	183
Harry Seidenspinner	287	188
Howard M. Sines	291	190
Henry Schneeman	293	192
John P. Ewald	296	194
Alfred Wallsman	297	195
Julian E. Grieshaber	299	196
John G. Goss	301	198
Elmer H. Barnum	302	199
William C. Ettershank	303	199
Max E. Hoyt	317	209
William C. Ettershank (recalled)	323	212
Motion to dismiss	328	215
Motion to exclude testimony	329	216
Colloquy	330	217
Testimony of Max E. Hoyt	333	219

	Original	Print
Testimony of W. Ernest Dodge	343	225
Defendant's motion for judgment	345	227
Order settling bill of exceptions	347	228
Assignments of error	348	229
Stipulation as to record	388	254
Clerk's certificate (omitted in printing)	390	
Proceedings in United States circuit court of appeals, second circuit	391	255
Opinion, Manton, J	391	255
Judgment	395	261
Petition for rehearing (omitted in printing)	397	
Order denying rehearing	411	262
Clerk's certificate (omitted in printing)	413	
Order allowing certiorari	414	262

[fols. a–1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

At Law. No. 3360

AMERICAN CHAIN COMPANY, INC., 929 Connecticut Avenue, Bridgeport, Connecticut, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue of the United States of America for the District of Connecticut, Hartford, Connecticut, Defendant

COMPLAINT

UNITED STATES OF AMERICA,
District of Connecticut, ss:

The President of the United States of America to the Marshal of the District of Connecticut, Greeting:

You are hereby commanded to summon Robert O. Eaton, the Collector of Internal Revenue for the District of Connecticut, of North Haven in the State and District of Connecticut, defendant herein to appear before the District Court of the United States for the District of Connecticut on the first Monday of Sepember, 1929, then and [fol. 2] there to answer unto American Chain Company, Inc., a corporation under the laws of the State of New York, and having its principal office and place of business in Bridgeport in the County of Fairfield and State of Connecticut, plaintiff herein, in a civil action wherein the plaintiff complains and says:

1. That the plaintiff, at all times hereinafter mentioned, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business in said City of Bridgeport in the State of Connecticut, and within the United States Internal Revenue District of the State of Connecticut, and brings this action in its own right.

2. That the defendant is a citizen of the United States and a resident of said North Haven, County of New Haven, State of Connecticut, and was at all the times mentioned herein and now is a duly appointed, qualified and acting Collector of Internal Revenue of the United States of America for the District of Connecticut, in which District the City of Bridgeport is located.

3. That the plaintiff is and was at all times mentioned herein engaged in the manufacture and sale of tire chain grips together with other commodities, and that said grips are and were sold for, and used on, solid, and pneumatic tires of automotive vehicles, such as tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. That said grips were manufactured to fit the [fol. 3] tires of automotive vehicles whether of tractors, fire engines, and vehicles not subject to the excise tax, or automobiles and trucks subject to tax within the purview of subdivision (3), Section 900 of Title IX, of the Revenue Act of 1921. That during the year 1923 it sold to its customers said tire chain grips having a general commercial use other than on the tires of automobiles, trucks, and automobile wagons and paid tax thereon at 5% as and in the amount herein alleged.

4. That an excise tax at the rate of 5% under Title IX, Section 900, subdivision (3) of the Act of Congress of the United States, entitled "Revenue Act of 1921," was assessed against the plaintiff on sales of said tire chain grips and paid by it to the defendant as Collector of Internal Revenue of the United States of America, aggregating the sum of Three hundred fifty-two thousand, one hundred eleven Dollars and fifty-one Cents ($352,111.51); that said payments made by plaintiff to defendant as its manufacturer's excise tax on the sales of tire chain grips made by it during the year 1923, were supposed by plaintiff to be due and payable to the United States of America and to said defendant as Collector of Internal Revenue, as demanded of plaintiff under and by virtue of the said subdivision (3) of Section 900 of Title IX of said Revenue Act of 1921; that the following is a schedule showing the amounts of payments made by plaintiff as above set forth, the months for which payments were made, and the dates on which the same were made:

[fol. 4]

1923	Amount of tax claimed as refund	Date of payment
January	$38,110.22	Feb. 27, 1923
February	14,718.93	Mar. 29, 1923
March	12,006.19	Apr. 28, 1923
April	6,885.62	May 29, 1923
May	16,87[illegible].91	June 29, 1923
June	42,578.80	July 30, 1923
July	39,381.35	Aug. 30, 1923
August	41,417.81	Sept. 28, 1923
September	33,299.13	Oct. 30, 1923
October	45,877.97	Nov. 28, 1923
November	36,818.58	Dec. 29, 1923
December	24,442.00	Jan. 30, 1924
	$352,111.51	

5. That said tax represents 5% of the invoice price of all tire chain grips sold by the plaintiff from January 1. to December 31, 1923, inclusive; that said tax was not paid either directly or indirectly by the purchaser of said grips, but was paid entirely by the plaintiff and said grips were sold to the customers of plaintiff at a flat price and no amount for excise tax was included therein; that plaintiff did not increase the price of said chain grips by the amount of the excise tax, but absorbed said amount of tax without passing it on to the purchasers.

[fol. 5] 6. That on or about the 9th day of February, 1927, the plaintiff filed with the defendant its claim for refund of the amount of $352,111.51 so paid to the defendant as Collector of Internal Revenue and more particularly set forth in the above schedule of payments. That on or about the 5th day of July, 1927, the then Acting Commissioner of Internal Revenue by notice to plaintiff rejected in full said claim for refund and refused to refund to plaintiff the said sum; that the defendant and the Commissioner of Internal Revenue have at all times since said date refused to refund to plaintiff the amount of said payments made by plaintiff to defendant as above set forth.

7. That said tire chain grips sold and used for the tires of automotive vehicles are of a design, shape, size and of dimensions exactly similar to chain grips used for the tires

of tractors, fire engines and equipment, and similar vehicles not subject to tax within the purview of subdivision (3), Section 900, of Title IX of the Revenue Act of 1921. That tire chain grips of exactly the same type and specifications as those sold by plaintiff and tax paid during said period can be and are now commonly and profitably used upon both taxable and non-taxable automotive vehicles; that there is nothing in the design and construction of said grips sold by plaintiff as herein alleged to make them primarily adapted only for use on tires of automobiles, trucks or automobile wagons and that said grips may be and are used for other purposes and especially for the tires of tractors, fire engines and similar equipment; that [fol. 6] the Commissioner of Internal Revenue has found and freely admitted to plaintiff that a substantial number of said tire chain grips were sold and used upon vehicles not subject to said tax but said Commissioner refuses to make refund of the tax paid as herein alleged on said grips so sold for the reason that the exact amount of sales therefor is not ascertainable; that said chain grips sold by plaintiff during said period were not sold on or in connection with automobile trucks, automobile wagons, automobiles and/or motorcycles, or in connection with the sale thereof; that said tire chain grips were not parts or accessories for automobile trucks, automobile wagons, other automobiles and/or motorcycles, within the intent and meaning of Section 900, Title IX of the Revenue Act of 1921 or any subdivision thereof, but were in fact commercial commodities interchangeable as to use on both taxable and non-taxable vehicles, were so advertised and were commonly sold for such general purposes.

Wherefore plaintiff prays judgment against the defendant in the amount of Three hundred fifty-two thousand one hundred eleven Dollars and fifty-one Cents ($352,111.51), with interest as follows:

On $38,110.22, from February 27 1923,
On $14,718.93, from March 29, 1923,
On $12,006.19, from April 28, 1923,
On $6,585.62, from May 29, 1923,
On $16,874.91, from June 29, 1923,
On $42,578.80, from July 30, 1923,
On $39,381.35, from August 30, 1923,

On $41,417.81, from September 28, 1923,
[fol. 7] On $33,299.13, from October 30, 1923,
On $45,877.97, from November 28, 1923,
On $36,818.50, from December 29, 1923,
On $24,442.00, from January 30, 1924.

Sanford Stoddard of Bridgeport is recognized in the sum of $150.00 to prosecute, etc.

Hereof fail not, but of this writ due notice and return make.

Witness the Honorable Edwin S. Thomas, Judge of the District Court of the United States, for the District of Connecticut, and the seal of said Court, at New Haven in said District, the 2nd day of July, A. D. 1929.

(Signed) C. E. Pickett, Clerk of the District Court of the United States for the District of Connecticut. David S. Day, Attorney for Plaintiff, Office and Post Office Address, 886 Main Street, Bridgeport, Connecticut. Long, Chamberlain and Nyce, of Counsel, Washington, D. C.

[fol. 8] IN UNITED STATES DISTRICT COURT

Law. No. 3360.

[Title omitted]

MOTION TO DISMISS

The defendant herein respectfully moves this Court to dismiss the Complaint heretofore filed in this action for the following reasons:

1. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise tax, paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, in an action instituted subsequent to April 30, 1928.

2. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action for the recovery of manufacturer's excise tax, paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, subsequent to May 29, 1928, the effective date of such act.

3. The provisions of Section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this Court is without jurisdiction to review.

[fol. 9] 4. The provisions of Section 424 of the Revenue Act of 1928 provide an exclusive remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921.

Dated at Hartford, this 18th day of July, A. D. 1929.

John Buckley, United States Attorney. George H. Cohen, Asst. United States Attorney, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

At Law. Nos. 3360, 3371, 3421.

AMERICAN CHAIN COMPANY

v.

ROBERT O. EATON, Collector

MEMORANDUM OF DECISION ON MOTIONS TO DISMISS

These cases are before the Court on defendant's motions to dismiss all three suits which are actions at law brought against the Internal Revenue Collector to recover, in each [fol. 10] instance, a manufacturer's excise tax paid by the plaintiff, a manufacturer of chain grips, under the provisions of Section 900(3) of the Revenue Act of 1921 and 600(3) of the Revenue Act of 1924, for the taxable periods from January to December, 1923, inclusive,—July to December, 1922, inclusive and from January to June, 1924, inclusive,—in the amounts of $352,111.51, $183,365.49 and $105,031.43, respectively.

While the motions to dismiss do not, in terms, challenge the jurisdiction of this Court, nevertheless, they must be so regarded to escape denial eo instanti. In this jurisdiction the method of attacking the sufficiency of a pleading is by demurrer,—and as these are all actions at law, the practice of the Connecticut Courts governs. However, in spite of his failure to clearly and definitely allege, in his motions,

that this Court has no jurisdiction either of the parties or of the subject matter, the defendant has in his brief expressly taken the position that these motions address themselves, not to the sufficiency of the complaints, but to the scope of our jurisdiction, and we may therefore overlook the inartificial phrasing of the motions which read:

"1. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise tax, paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, in an action instituted subsequent to April 30, 1928.

[fol. 11] "2. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action for the recovery of manufacturer's excise tax, paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, subsequent to May 29, 1928, the effective date of such Act.

"3. The provisions of Section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this Court is without jurisdiction to review.

"4. The provisions of Section 424 of the Revenue Act of 1928 provide an exclusive remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921."

Before inquiring into the cogency of these assertions, let us briefly restate the material allegations of the complaint. The plaintiff, a corporation organized under the laws of the State of New York, with its principal office in Bridgeport, in this District, brings these actions against the defendant, a citizen of the United States and a resident of the State of Connecticut, to recover a sum in excess of $3,000 alleged to have been unlawfully received by the defendant. Whether these actions be regarded as one ex delicto or ex contractu—whether they are justified under the revenue laws of the United States or under the principles of the com-
[fol. 12] mon law,—or whether they are untenable on any known theory, is not the question before me. We are not now examining the sufficiency of the allegations to make out a cause of action. What we have here is a claim for a money recovery in excess of the jurisdictional amount of

$3,000 set forth in an action at law brought by a citizen of the State of New York against a resident of the State of Connecticut. It can hardly be denied that there is enough alleged upon which to found jurisdiction, even if there be nothing more than a jurisdiction to dismiss for failure to state a cause of action.

But jurisdiction need not rest upon a diversity of citizenship which, after all, happens here to be but a fortuitous incident. The plaintiff alleges that it is a manufacturer of chain grips for automobile tires and other commodities and that the chain grips were used on tires of all kinds of automotive vehicles, many of which were not subject to the excise tax on automobiles within the purview of Section 900 (3) of the Revenue Act of 1921. The plaintiff, however, paid the 5% tax on its sales assessed against it on the invoice price of all tire chain grips, which tax was not passed, directly or indirectly, on to the purchasers of said chain grips which fact had been established to the satisfaction of the Commissioner of Internal Revenue. There are the usual allegations of the filing of a claim for refund and the disallowance of the claim by the Internal Revenue Commissioner.

The first objection urged to the jurisdiction of the Court is that Section 424 of the Revenue Act of 1928 deprived the [fol. 13] "plaintiff of its privilege of refund" * * * "in an action instituted subsequent to April 30, 1928." With the accuracy of this, as a statement of law, I am not now concerned. I should say that, conceding its validity, it furnishes no basis for attacking the jurisdiction of the Court. It embodies either a criticism of the sufficiency of the complaint or a defense in the nature of the statute of limitations. There is nothing either in the text of the statute itself, or in its rather free rendering,—in the language of the defendant's objection, which even remotely restricts the grant of jurisdiction legislated to this Court and delimited in the United States Judicial Code.

The second objection is identical with the first, excepting that the limitation is fixed at May 29, 1928, instead of April 30, 1928.

The third objection alleges that the Commissioner of Internal Revenue has sole discretion in the matter of refunding the excise tax, which discretion is not subject to judicial review. But this again, in its essence, is an objection to

the sufficiency of the case made out by the plaintiff rather than a critique of our jurisdiction. If, however, it is intended to assert that Section 424 of the Revenue Act of 1928 embodies a prohibition against the exercise of a jurisdiction elsewhere granted then I overrule this contention. I find nothing in the language of that statute which expressly, or by implication, warrants such a conclusion. At most the statute presents a perfect defense to such an action, or, perhaps, a good ground for dismissing for insuf- [fol. 14] ficiency. The same observation applies to the fourth ground set forth in the motion.

The defendant cites and relies upon Sterling Spring Company v. Routzahn, decided May 8, 1929, by Judge Jones in the Northern District of Ohio. A reading of the opinion in that case leaves this Court somewhat uncertain as to whether the learned Judge intended to hold that the District Court had no jurisdiction to entertain the action or that the complaint was insufficient in law. The ground of the motion to dismiss was that "recovery is precluded under Section 424, etc." It is elementary that such an attack goes to the merits of the alleged cause of action and not to the jurisdiction of the Court in the premises. If that decision was intended as a pronouncement on jurisdiction then I am constrained to disagree with it.

In a later decision in the same District rendered in Willard Storage Battery Co. v. Routzahn, Judge West referred to the Sterling Spring case and took pains to announce that Judge Jones had, in conference with him, declared that his decision was not to be regarded as the law of the District. In the Willard Storage Battery case Judge West reached an opposite conclusion, and in so far as that conclusion sustains the jurisdiction of the Court, I am in accord with it. See also Boyle Valve Company v. United States, 38 Fed. (2d) 135; Jefferson Electric Manufacturing Co. v. United States, 38 Fed. (2d) 139, where it was held by the Court of Claims that Section 424 of the Revenue Act of 1928 did not prevent the filing of suits under the General Refund Act, [fol. 15] and that the action of the Commissioner of Internal Revenue under Section 424 was not conclusive and that the taxpayer, after the rejection of the claim, could maintain a suit in Court for refund.

At this time I express no opinion on the sufficiency of the complaint. The occasion for that will arise if and when

the proper procedure has been invoked. There is no question raised here but one of jurisdiction and none other is decided. It follows, therefore, that all three motions to dismiss in each instance are denied.

Submit Order Accordingly.

February 5, 1931.

Edwin S. Thomas, U. S. D. J.

[fol. 16] IN UNITED STATES DISTRICT COURT

Law. No. 3360.

[Title omitted]

ORDER OVERRULING DEFENDANT'S MOTION TO DISMISS

This action, by writ and complaint claiming $352,111.51 damages, came to this court on the first Monday of September, 1929 and thence to the present time, when the parties appeared and were at issue on the defendant's motion to dismiss as on file.

The court, having heard the parties, finds the issues for the plaintiff, and orders that the defendant's motion to dismiss be denied.

Dated at New Haven this 1st day of June, 1931.

Edwin S. Thomas, U. S. D. J.

[fol. 17] IN UNITED STATES DISTRICT COURT

Law. No. 3360

[Title omitted]

ANSWER

Paragraph one of plaintiff's petition is admitted except defendant denies plaintiff brings this action in its own right.

Paragraph two of plaintiff's petition is admitted.

With respect to paragraph three of plaintiff's petition, defendant admits and alleges that plaintiff is and was at

all times mentioned herein engaged in the manufacture and sale of chain grips and that said grips are and were primarily designed, manufactured, advertised, sold for and used on solid and pneumatic tires of automotive vehicles such as automobiles trucks, automobile wagons, other automobiles and motorcycles, but defendant denies such chain grips were sold for and used on tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. Further answering paragraph three defendant admits and alleges that said chain grips were designed, manufactured, advertised, and sold to fit the tires of automotive vehicles such as automobile trucks, automobile wagons, [fol. 18] other automobiles, and motorcycles as parts or accessories thereof within the purview of Section 900 of the Revenue Act of 1921, but defendant denies that such grips were designed, manufactured and sold for use on tractors, fire engines and vehicles not subject to excise tax. Further answering paragraph three defendant admits and alleges that during the year 1923 plaintiff sold to its customers namely, jobbers and distributors, said chain grips primarily designed, manufactured, and advertised for use on automobile trucks, automobile wagons, other automobiles and motorcycles and that plaintiff paid tax thereon at the rate of 5% in the amount of $352,111.51, but defendant specially denies that said chain grips have or had a general commercial use and defendant specially denies said chain grips were sold for use or used on other than the tires of automobile trucks, automobile wagons, other automobiles, and motorcycles.

Paragraph four of plaintiff's petition is admitted.

Defendant denies the averments of paragraph five of plaintiff's petition and alleges that the tax in question represents the amount shown on the manufacturer's excise tax returns filed by and assessed against plaintiff for each of the taxable periods involved.

Paragraph six of plaintiff's petition is admitted.

Defendant denies the averments of paragraph seven of plaintiff's petition and alleges that the chain grips manufactured and sold by plaintiff during the taxable periods in question, upon the sale of which tax in question was imposed, were primarily designed, manufactured, advertised, and sold for use on or in connection with automobile trucks, automobile wagons, other automobiles, and motorcycles as

[fol. 19] parts or accessories thereof within the meaning of the provisions of Section 900 of the Revenue Act of 1921.

—— ——, Defendant, by John Buckley, United States Attorney; George H. Cohen, Assistant United States Attorney, His Attorneys.

IN UNITED STATES DISTRICT COURT

LAW. No. 3360

[Title omitted]

PLAINTIFF'S REPLY

The plaintiff denies the allegations contained in the defendant's answer.

—— ——, Plaintiff, by Marsh, Stoddard & Day, Its Attorneys.

[fol. 20] IN UNITED STATES DISTRICT COURT

At Law. No. 3360

[Title omitted]

STIPULATION WAIVING TRIAL BY JURY

It is hereby stipulated and agreed by and between the parties herein that the trial of this cause by jury is hereby waived, and it is agreed that all issues therein may be determined by the court sitting without a jury.

Dated at New Haven, Connecticut, this 27th day of October, 1931.

—— ——, Plaintiff, by Long, Chamberlain & Nyce, Marsh, Stoddard & Day, Its Attorneys. —— ——, Defendant, by George H. Cohen, Asst. U. S. Attorney, His Attorney.

[fol. 21] IN UNITED STATES DISTRICT COURT

No. 3360

[Title omitted]

MOTION FOR JUDGMENT

The defendant herein respectfully moves this court for judgment in favor of the defendant and against the plaintiff, for the following reasons:

1. Plaintiff has failed to show by the evidence the particular sales upon which it paid excise taxes, for the taxable periods January, 1923, to December, 1923, inclusive.

2. Plaintiff has failed to show by the evidence the particular sizes, types and weights of "Weed Chains" upon the sales of which excise taxes were imposed for the taxable periods January, 1923, to December, 1923, inclusive.

3. Plaintiff has failed to show by the evidence the numbers of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods January, 1923, to December, 1923, inclusive.

[fol. 22] 4. Plaintiff has failed to show by the evidence the amount of tax paid on sales of "Weed Chains" by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles for the taxable periods January, 1923, to December, 1923, inclusive.

5. Plaintiff has failed to show by the evidence the number, sizes, types and weights of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods January, 1923, to December, 1923, inclusive.

6. Plaintiff has failed to show by the evidence the "Weed Chains" manufactured and sold by it during the taxable periods, January, 1923, to December, 1923, inclusive, were not designed to be attached to or used in connection with automobile trucks, automobile wagons or other automobiles to add to their utility or ornamentation.

7. Plaintiff has failed to show by the evidence the "Weed Chains", manufactured and sold by it during the taxable periods January, 1923, to December, 1923, inclusive, were not primarily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

8. Plaintiff has failed to sustain the burden of proof placed upon it in this action.

[fol. 23] 9. Plaintiff has failed to show by the evidence it has fully complied with the provisions of the Revenue Act of 1921 and Regulations 47 of the Treasury Department promulgated thereunder in that it has failed to avail itself of the exemption provisions of such Act and Articles 15 and 16 of such Regulations.

10. The evidence conclusively shows the "Weed Chains", manufactured and sold by plaintiff during the taxable periods, January, 1923, to December, 1923, inclusive, the sales of which were taxed, were designed to be attached to or used in connection with automobile trucks, automobile wagons, or other automobiles, to add to their utility or ornamentation.

11. The evidence conclusively shows the "Weed Chains", manufactured and sold by plaintiff during the taxable periods, January, 1923, to December, 1923, inclusive, were primarily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

12. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921.

13. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and [fol. 24] maintaining this action, for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, subsequent to May 29, 1928.

14. The provisions of Section 424 of the Revenue Act of 1928 vest certain specified discretionary powers in the

commissioner of Internal Revenue which this Court is without jurisdiction to determine or review.

15. The provisions of Section 424 (a) (1) of the Revenue Act of 1928 limit the jurisdiction of this court, to hear and determine the issues in an action for the recovery of manufacturer's excise taxes paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928.

16. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, which is exclusive of all other remedy.

17. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, regardless of the non-taxable claims of the plaintiff.

18. The plaintiff has failed to show by the evidence that the uses to which the "Weed Chains", manufactured and sold by it during the taxable periods, January, 1923, to [fol. 25] December, 1923, inclusive, other than their use in connection with automobile trucks, automobile wagons, or other automobiles, required chains of the same design, type, size, weight, hardness, and tensile strength as is required for automobile truck, automobile wagon or other automobile uses.

19. Plaintiff has failed to show by the evidence that the tax in question in this action was imposed upon sales by its distributors, jobbers, or dealers to the consumer during the taxable periods, January, 1923, to December, 1923, inclusive.

20. Plaintiff has failed to show by the evidence that the chains manufactured and sold by it during the taxable periods January, 1923, to December, 1923, were sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons or other automobiles.

E. F. McMahon.

[fol. 26] IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

Law. Nos. 3360, 3371, 3421

AMERICAN CHAIN COMPANY, INC., Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue, Defendant

Long, Chamberlain & Nyce (Chester I. Long, Esq., and Charles P. Swindler, Esq., of counsel), all of Washington, D. C., and

Marsh, Stoddard & Day (David S. Day, Esq., of counsel), both of Bridgeport, Connecticut, for Plaintiff.

C. M. Charest, General Counsel, Bureau of Internal Revenue, E. F. McMahon, Special Attorney, Bureau of Internal Revenue, both of Washington, D. C., and John Buckley, United States Attorney, and George H. Cohen, Assistant United States Attorney, both of Hartford, Connecticut, for Defendant.

OPINION OF JUDGE HINCKS

These are three actions brought by a corporation of New York against the Collector of Internal Revenue for this [fol. 27] District for the recovery of excise taxes exacted by the Commissioner and paid by the plaintiff upon the sale of Weed tire chains for automotive vehicles. The actions are identical as to the pleadings, the only difference being that each action covers a different taxable period. Thus case No. 3371, begun in August 1929, seeks recovery of the tax paid for the taxable period of July 1 to December 31, 1922, in the amount of $183,365.49, with interest. Case No. 3360, begun in July 1929, seeks recovery of the tax paid for the taxable period of January 1 to December 31, 1923, in the amount of $352,111.51, with interest. And Case No. 3360, begun in July 1929, seeks recovery of the tax paid for the taxable period of January 1 to June 30, 1924, in the amount of $105,031.43, with interest.

The cases were brought on together for trial before a jury, but at the close of the plaintiff's case, at the suggestion of the court, both parties waived their right to jury trial, and the remainder of the evidence, and the issues

both of fact and of law, were submitted to the Court for decision.

The Pleadings

The complaint in each case alleges that the plaintiff is a corporation engaged in the manufacture and sale of tire chains such as are commonly used on the tires of automotive vehicles; and that during the respective taxable periods it sold a large number of said chains; that under the Revenue Acts of 1921 and 1924 a tax of 5 per cent [fol. 28] was assessed upon such sales and subsequently collected; that the plaintiff duly filed its claim for refund, which was rejected and denied by the Commissioner of Internal Revenue. As to the foregoing allegations there was no dispute. The only issues were raised by the defendant's denial addressed to Paragraphs 1, 5 and 7 of the complaint.

Paragraph 1 alleged that the plaintiff "brings this action in its own right." The allegation was supported by credible testimony on the part of the plaintiff, and was not disputed by the defendant on the trial. Doubtless the contention involved was tacitly abandoned by the defendant. In any event, on the evidence as to this issue I find in favor of the plaintiff, and the issue may be laid out of a further consideration of the case.

Paragraph 5 of the complaint alleged that the taxes in question were paid entirely by the plaintiff, and neither directly nor indirectly by the plaintiff's purchasers. These allegations also were denied.

As to this issue, I find that for the taxable period involved in case No. 3371, the plaintiff has sustained the burden of proof. The evidence on this issue relating to the periods involved in cases Nos. 3360 and 3421, disclosed that the plaintiff at some time during the period between January 1 and December 31, 1923, reduced its sale prices by the amount of the tax and so stamped its invoices and bills as to indicate that of the amount charged to the customer 1/21 part was required by the sales tax in question. Thereafter the plaintiff computed and paid the excise tax upon [fol. 29] the basis of the price thus reduced, thereby saving to itself the payment of a tax upon a tax, 5 per cent on 5 per cent. The arrangement cost the customer nothing, as he paid in the aggregate just what he had paid before.

Consequently the plaintiff did not thereby pass the economic burden of the tax to its purchasers. However, since under this arrangement the invoices indicated the 1/21 of the amount billed was for the tax, I am constrained to conclude that the balance, 20/21, was the real sale price, especially since the tax was thereafter paid on that basis. This requires the conclusion of fact that in legal effect the tax was collected from the purchaser. But in view of the fact that the sales prices in vogue prior to the inauguration of this arrangement were thereafter reduced by the amount of the tax, I find further that in so far as the tax was collected from purchasers, it was wholly returned to them.

The issue which produced by far the greater part of the record was whether or not the chains, upon the sale of which the tax was laid, were "accessories for any of the articles enumerated" within the purview of Sec. 900 of the Revenue Act of 1921. This issue was framed principally by the allegations of paragraph 7 of the complaint that the chains in question were of a design, shape, size and dimensions exactly similar to those used for tires of tractors, fire engines and similar vehicles not within the purview of the Revenue Act, and that there was nothing in their design and construction to make them primarily adapted only for use on the taxable articles enumerated therein; that they [fol. 30] were not sold on or in connection with such taxable vehicles; that they were not accessories of such vehicles within the meaning of the Act, but were in fact commercial commodities interchangeable as to their use on both taxable and non-taxable vehicles, and were advertised and commonly sold and profitably used for such general purposes. These allegations were denied.

From the evidence I find that the chains in question were all sold by the plaintiff to jobbers and dealers, so that even the plaintiff did not know, and could not know, how many of the chains thus sold were eventually used or purchased for use on non-taxable vehicles; that said chains generally were advertised by the plaintiff for use on non-taxable vehicles as well as taxable ones; that said chains were manufactured in a multitude of sizes, varying not only in the length of the side or rim chain, but also in the length of the cross chain, and generally heavier wire was used throughout in construction of the larger sizes. Of this number, however, 49 sizes, which will be listed in Schedule "A," hereinafter referred to, fitted at least one type of

non-taxable vehicles equally as well as any taxable vehicle; that they operated as effectively upon the one class of vehicles as upon the other; that wholly without adaptation for the purpose they were interchangeable upon such vehicles of both classes as used tires of substantially the same size; that there was no differentiation either of construction or of design in the chains used on the tires of non-taxable vehicles from those used on tires of taxable vehicles; and [fol. 31] that in ordering chains, the universal practice was to order by size only, without specification of the purpose, i. e., whether for taxable or non-taxable vehicles.

If it be deemed of any importance, notwithstanding the views expressed in the following opinion, it may be noted as a part of the findings of fact that the mechanical design (i. e., the invention) of the plaintiff's chains was embodied in patents issued as early as 1904, and chains were in use for automobiles and trucks before the internal-combustion tractor came upon the market.

It may also be noted that the number of taxable vehicles during the taxable periods exceeded the number of non-taxable motor vehicles. If that fact was not fully established by competent evidence, at least it was conceded by the plaintiff on brief.

On the subordinate facts, I conclude that the chains listed in Schedule "A" were not primarily adapted for use on taxable vehicles, but were equally adapted for use on non-taxable vehicles.

Although, as stated, the plaintiff did not, and necessarily could not, prove by direct evidence that any particular chain found its way to the wheel of a non-taxable vehicle, yet from the evidence that the sizes listed in Schedule "A" were adapted for such use, and that it was common practice for all types of non-taxable vehicles generally to use such chains and, indeed, that the use of such chains was often required for the successful and efficient operation of such vehicles, I conclude that the sizes listed in Schedule "A" were actually used on non-taxable vehicles, and that such use was common, substantial and profitable—not exceptional or experimental only.

[fol. 32] The evidence does not, however, establish the fact that there were in existence during the taxable periods non-taxable vehicles which respectively have requirements calling for chain sizes other than those listed on Schedule "A." Accordingly, I find that all the chains sold, except

those listed on Schedule "A," were designed and primarily adapted for use on taxable vehicles, there being no evidence that they had any other use during such periods.

The list of sizes, 49 in number, for which a non-taxable use was shown, together with the amounts of taxes paid on all chains of each such size sold during each of the three taxable periods, are shown on Schedule "A," which may be attached hereto and shall constitute a part of the findings herein.

The facts bearing on the computation of interest, I find to be as follows: The tax on the sales of each month was paid by the plaintiff on or before the last day of the next succeeding month. The plaintiff by Exhibit 51 shows month by month the tax paid on all sizes, lumped together, of the chains sold during the taxable period. The evidence, however, contains nothing to show the month by month payment of the tax upon the numerous sizes of chains separately stated. Consequently, on the evidence, the only useful conclusion possible is that so much of the tax as was paid upon the sizes listed in Schedule "A" was in each case paid not later than the last day of the month following the taxable period in question.

The plaintiff, on trial and on brief, has contended that [fol. 33] some of the chains sold (49 in number according to my finding) have been shown to be commonly used on non-taxable vehicles and to be equally adapted to such use, and that since in fact the only difference between such chains and the others sold by the plaintiff is a difference of size only, it must be held that all chains so sold are not "accessories for any of the articles enumerated" as taxable vehicles within the meaning of the Act, and that therefore the tax upon the sale of all the chains in question was illegally assessed and collected.

The defendant on the other hand claims that the sales of all the plaintiff's chains were taxable and that the plaintiff has failed to establish the burden of proof to the contrary. I believe study of the basic law will disclose that both claims are too broad.

The statute under which the taxes in question were exacted and paid was Sec. 900 of the Revenue Act of 1921 (42 Stat. 291), which reads as follows:

"Sec. 900. That there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to

the following percentages of the price for which so sold or leased:

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

[fol. 34] "(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof, except tractors, 5 per centum;

"(3) Tires, inner tubes, parts or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;" * * *

The Act itself thus enumerates automobile trucks, automobile wagons, other automobile and motorcycles as being vehicles subject to a sales tax (either of 3 per cent, or 5 per cent) and expressly exempts tractors from the tax.

In the case of American-LaFrance Fire Engines Co. v. Riordan, 6 Fed. (2nd) 964, it was held that fire engines and fire apparatus were not subject to the sales tax. This decision has never been overruled and must be deemed to be the law.

It will also be observed that regulations 47, Article 12, provides that self-propelling machines such as concrete mixers, stone crushers, etc., and machines which perform a mechanical function as they move along the highway, such as road graders and scrapers, sprinklers, etc., are not subject to tax.

Thus, by express provision of the Act, by judicial decision and by treasury regulations, certain types of automotive vehicles are held to be exempt from the excise tax. It is to such vehicles, of course, that I had reference when, in [fol. 35] the findings of fact above, I used the term "nontaxable vehicles," and for brevity I shall use the phrase in the same meaning throughout this opinion. Similarly the words "taxable vehicles" will be used to denote all vehicles subject to tax under this Act.

Pursuant to the authority contained in said Act, the Commissioner of Internal Revenue prescribed and promulgated Regulations No. 47 (Revised December, 1921)

for the enforcement of the Act. These Regulations provide as follows:

"Article 16

"Art. 16. Definition of Accessories.—An 'accessory' for an automobile truck, automobile wagon, or other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

"The term 'accessories' includes, for example, automobile tops, back and side curtains, horns, speedometers, self-starters, spot lights, shock absorbers, tire pumps, pressure gauges, and hydrometers.

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as 'parts' or 'accessories.' Thus a wrench or other tool [fol. 36] of a kind ordinarily sold in hardware stores for general purposes is not subject to tax when sold separately, but if incorporated in an automobile tool kit, designed, intended, advertised, or held out for use on an automobile as distinguished from garage or shop equipment, is taxable as part of the completed kit." * * *

"Robes, goggles, and lunch kits are not subject to tax. Asbestos brake-bank linings, generator tubing, and radiator hose are not subject to tax unless sold in prepared sizes, lengths, shapes, or with such fittings as make them adapted for use only on or in connection with automobiles.

"Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motor-cycles primarily adapted for use on or in connection therewith when sold for any other purpose are not taxable provided the purchaser files with his order a statement that such parts or accessories are to be used on or in connection with another article of commerce not enumerated or included in subdivisions (1), (2), or (3) of Section 900. For example, a self-starter primarily adapted for use on an automobile, if sold to a manufacturer of motor boats, such manufacturer stating in his order that it is to be used in the manufacture of a motor boat and not upon an automobile, is not taxable."

At the outset it must be noted that the Act does not impose a tax upon accessories. Instead, the tax attaches only to the sales of "accessories for any of the articles enumer- [fol. 37] ated," i. e., taxable vehicles. The distinction is important because the word "accessories," considered for its inherent content, is broad enough to include all articles which have some use incidental to some other element or article. Thus, if accessories be deemed a class, membership in that class is determined not by the inherent characteristics of the article in question, but rather by its inherent relative capacity. Thus it is clear that if the word denotes a class, it is not a generic class, but rather a miscellaneous array of articles which come within the connotation of the word not because of any similarity to each other but solely because they have in common a certain capacity of association. To be sure, the word denotes objects of physical properties, but it would seem that everything in the wide domain of physics must come within the scope of the word provided always it has the capacity for association. Thus, in the case of Universal Battery Co. v. U. S., 281 U. S. 582, the court said:

"Taking the three subdivisions together it is apparent that the words 'parts' and 'accessories' have the same meaning in all; that they comprehend articles having some relation to the enumerated motor vehicles; and that it is because of that relation that the tax is laid on their sale." * * *

Consequently, if the Act defines a class of articles for purposes of taxation, the controlling definition must be found not in the word "accessories," but rather in its objective qualification "for any of the articles enumerated [fol. 38] in subdivision (1) or (2)," that is, in taxable motor vehicles. And so it is that the Court, in the case just referred to, said:

"Thus the scheme of taxation embodied in these provisions centers around the motor vehicles enumerated therein. Their sale is the principal thing that is taxed, and the sale of parts and accessories 'for' such vehicles is taxed because the parts and accessories are within the same field with the vehicles and used to the same ends."

It results that though one article be a large or small replica of another, it does not follow that both belong to the

class of accessories for taxable vehicles. Without any difference except of size, within the meaning of the Act one article might be an accessory, another not. Thus the plaintiff could not recover the tax on all chains sold merely by proof that the chains used on certain non-taxable vehicles were identical with those used on taxable vehicles, and except for sizes were identical with all the other chains sold. It sustained the burden of proof only in so far as it established an actual use on non-taxable vehicles for each size of chain. In other words, such sizes as were not shown to have an actual non-taxable use, were not non-taxable merely because identical except as to size with some generic class of chains. For, as we have seen, the Act does not impose the tax upon a generic class.

That a showing of a common use on non-taxable vehicles was an essential part of the plaintiff's case is indicated by [fol. 39] another expression of the Court in its opinion in the Universal Battery case, supra:

"Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used."

To prove a use for a chain of any given size on non-taxable vehicles, it was indispensable for the plaintiff to show that a non-taxable vehicle existed calling for that specific size of chain. The existence of the use thus established, that it was a common use might be proved by circumstantial evidence. And all chains of sizes thus proved to have an actual and common use with non-taxable vehicles were thereby shown to be commodities other than accessories for taxable vehicles.

Thus the contention of each party is too broad in that it is predicated upon the proposition that the tax falls upon a generic class which must include all or none of the chains sold.

The defendant puts particular emphasis on that portion of Regulations 47, Article 16, which speaks of design and defines an accessory as an article "designed to be attached to or used in connection with such vehicle or article * * *".

It is argued that since the original patents of the chain in question were applied for and issued prior to the advent of non-taxable vehicles, it necessarily follows that the chains [fol. 40] were designed for taxable vehicles which alone were in existence when the chain was invented. The argument, I believe, involves a misconstruction of the word "design" as used in the Regulations. Clearly, the design of the manufacturer and seller—not that of the original inventor—is what the regulations intended.

Indeed, this contention on the part of the defendant, if generally applied, would lead to incongruous results. For example, if the argument is valid, a storage battery could not be taxable as an accessory because the basic patent for storage batteries proceeded the automobile industry. But in the Universal Battery case it was clearly held that storage batteries might be taxable.

Again, the defendant argues that the question of adaptability is one which can be established only by proof of duty requirements. As to this claim, it need only be said that the Act, the Regulations, and all the reported cases contain no basis for the contention. And it is well established that the question of mechanical adaptability may be shown by pragmatic evidence that the mechanism in question does in fact function. Here, there is an abundance of testimony that the identical chain used on an automobile functions equally well on a non-taxable vehicle. That the testimony is the product of actual experience as distinguished from mathematical computation does not vitiate its admissibility and, if anything, adds to its weight.

The defendant further claims that under the doctrine of "chief use", the plaintiff cannot recover. This is a doctrine developed in connection with the construction of the tariff [fol. 41] laws, to aid in determining the membership of imported goods in the generic classes of articles subjected to tax by the statute. Its teaching is that when a certain article, by reason of its physical characteristics, may be claimed to lie within either of two classifications, its chief use shall control; and its "chief use was to be ascertained by that which was commonly, practically, and generally done." Magone v. Wiederer, 15 U. S. 555.

This case of Magone v. Wiederer is cited in the Universal Battery case, not to indicate that the old customs doctrine

of chief use has application to the Revenue Act of 1921, but, I think, to indicate that even under the customs cases exclusive use within the field of a certain classification was not required to bring the article in question within the classification. Indeed, the greater part of the Magone opinion was devoted to this proposition.

It may, therefore, be doubted that the test of chief use has application to cases under Section 900. But were it otherwise, the defendant's claim could not be sustained. For a study of the Magone case, and especially of the Judge's charge, which was expressly approved in the opinion, shows clearly that the existence of "chief use" is negatived by proof that the articles in question "have several uses to which they are perfectly applicable." And so it is that here the plaintiff, by proving that numerous sizes of chains have "several uses" (i. e., use on tractors, fire apparatus, road equipment, etc.) to which they are equally adapted (*and hence perfectly applicable*"), has fully negatived any possible basis which the defendant might have for claiming the applicability of this doctrine.

[fol. 42] Obviously, the tax might have been more easily administered if the Act had provided that all chains should be taxable. But since the Act makes their taxability dependent upon their relation to taxable vehicles, the labor of ascertaining the existence or non-existence of that relation, in the first instance on the part of the taxpayer and Treasury Department, and ultimately on the courts, cannot be allowed to change the effect of the Act.

The defendant at the close of its case made a motion for judgment upon the grounds of a motion to dismiss which it had filed at an earlier stage in these proceedings. Judge Thomas, in an opinion on file, treated this motion under the Connecticut practice as raising only the question of jurisdiction and, finding a presence of proper jurisdiction in this court, denied the motion. By its pending motion, the defendant thus renews its claim that the Commissioner, by Section 424 of the Revenue Act of 1928, was given fact-finding jurisdiction to the exclusion of the courts. The motion coming at this time also fairly raises the question whether, if there be jurisdiction in the court to find the facts, the plaintiff by its evidence in this case has established facts necessary to bring it within the said section.

The text of the section is as follows:

"Revenue Act of 1928

"Sec. 424. Refund of Automobile Accessories Tax.—(a) No refund shall be made of any amount paid by or collected [fol. 43] from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

"(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

"(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

"(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other per- [fol. 44] son) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

"(b) The second proviso under the heading 'Internal Revenue' in section 1 of the First Deficiency Act, fiscal year 1928, and the second proviso of the fourth paragraph under the heading 'Internal Revenue Service' in section 1 of the Treasury and Post Office Appropriation Act for the fiscal year 1929, are repealed."

A study of the Act will disclose that this motion therefore raises in addition to the jurisdictional question already decided, substantially the same questions as those involved in the issue, outlined above, as to whether the plaintiff itself paid these taxes for which it now seeks recovery, or whether they were collected directly or indirectly from plaintiff's customers.

On the question of jurisdiction, it may be observed that since Judge Thomas gave his opinion on the defendant's motion, the Supreme Court of the United States has said in Graham & Foster v. Goodcell, 282 U. S. 409:

"It is not necessary to review this analysis, for there can be no doubt that these words do have approximate reference [fol. 45] to action in the course of administration. But it does not follow that by the use of these words the statute is limited to such action. There is no basis for the suggestion that there were questions involved of such a character as to make it appropriate to submit them to the exclusive judgment of the Commissioner. The question was not as to the merits of the tax but simply as to the existence of certain facts of time and procedure. These facts were matters of record, easily ascertained and definite in character. It would be anomalous that the right of the taxpayer to obtain a refund from the Department, to which he was under obligation to resort (R. S. 3226, U. S. A. Tit. 26, sec. 156), should be denied, while the right to recover by suit the same amount under exactly the same circumstances should remain unaffected. In the attempt to explain this anomaly, it is said that the provision was inserted because of a distrust of administrative refunds. But section 611 contains no exception as to judicial proceedings, and its prohibition is one which can be enforced appropriately by the courts when the taxpayer demands relief by suit. We are brought back to the fundamental purpose of the statute, and we are unable to conclude that it established one rule for the Department and another for the courts. We think that it was intended to prevent refunds in the circumstances stated and not merely a particular way of getting the money from the Treasury; that the effect of the provision was to deny a [fol. 46] right to recover the amount paid and that the provision governs equally wherever the right is asserted."

In the case just referred to, it was claimed that certain provisions of the Revenue Act of 1928 dealing with "credit

and refunds'' and ''overpayment'' had application only to proceedings before the Department and not to proceedings before the court. But the reasoning of the court in holding otherwise seems to require the denial of the defendant's claim here that the effect of section 424 was to establish one rule for the Department, ousting the courts of jurisdiction.

Nor, when it has been so long and so firmly established that a taxpayer, feeling aggrieved, by appropriate action at law may have his claim heard by a court of the United States, and thus obtain a judicial determination of the very facts upon which the validity of the original assessment depended, will it be lightly held that Congress intended to make the exercise of discretion on the part of the Commissioner final without other than a departmental review. Indeed, in the ''First Deficiency Act, fiscal year 1929,'' approved March 4, 1929 (45 Stat. 613), in a paragraph under the heading, ''Treasury Department, Bureau of Internal Revenue,'' Congress prescribed certain procedural limitations upon the power of the Department in respect to tax refunds, in all cases other than those in which ''a suit in court or a proceeding before the Board of Tax Appeals has been or shall be instituted or payments in cases determined upon precedents established in decisions of courts, or the [fol. 47] the Board of Tax Appeals.'' In so far as this legislation indicates a congressional intent that the Department should follow the guidance of the courts, it impliedly negatives a legislative intent to confer on the Commissioner to the exclusion of the courts the fact-finding duty imposed by Section 424. Electric Storage Battery Co. v. McCaughn, 52 Fed. (2nd) 205; Boyle Valve Co. v. U. S., 38 Fed. (2nd) 135.

Concluding then that this court has jurisdiction, and, indeed, the responsibility of determining all questions of fact involved in Section 424 of the Act of 1928, it becomes necessary to determine what was meant by that Act. It will be observed that this Act, in Paragraph (b) repeals the second proviso under the heading ''Internal Revenue'' in Section 1 of the First Deficiency Act, fiscal year 1928 (45 Stat. 30). The proviso thus repealed prohibited the refund of the automobile accessories tax unless a bond were filed by the manufacturer conditioned upon the repayment of the tax ''to the persons who purchased for the purposes of con-

sumption (whether from such manufacturer * * * or from any other person)." In short, it is substantially the same as the provisions of Section 424 (a) (3). Thus the proviso appeared to assume that all taxes on accessories had been and would be passed along by manufacturer and dealer to the ultimate consumer, who would necessarily be left to bear the ultimate economic burden of the tax. Obviously, the assumption was faulty and consequently it is not surprising that a few months later Congress should have repealed this proviso and substituted therefor Section 424 of the Revenue [fol. 48] Act of 1928. This section, it will be observed, in Paragraph (a) prohibits the refund of the accessory tax with three exceptions serially numbered. The first exception, clause (1), deals with actions begun prior to April 30, 1928, and consequently is not here involved. The third exception, clause (3), largely reenacts the provisions of the proviso which we have just discussed, and fully provides for that class of cases in which the tax has been passed along to the ultimate consumer and has not been refunded to him. What is new in the section is that portion contained in Paragraph (a) (2). Obviously the exception therein set forth is intended to take care of all proper cases for a refund not included in the other exceptions. And so we find the Act prohibiting refunds unless the amount of the tax "was not collected, directly or indirectly, from the purchaser" or unless it had in fact already been "returned to him." In such cases obviously there was no occasion for the requirement of the bond prescribed in exception (3).

The findings in these cases, it is true, indicate that, beginning at some time in 1923, the tax in legal effect was "collected" from the purchasers. But it is also found that they did not bear the economic burden of the tax because the manufacturer itself absorbed the burden by reducing the price of the commodity by the amount of the tax. It also results that, although collected from the purchaser, the tax had been "returned to him." For the legal effect is the same whether the refund to the purchaser is made after the tax is "collected" from him, or whether it is sooner made [fol. 49] in the form of a price reduction before it is "collected" at all.

That such a conclusion is in full accord with the legislative intent is fully apparent from the report of the Ways and Means Committee with reference to this section, the

text of which is set forth in the opinion in Boyle Valve Co. v. U. S., supra. The report clearly indicates an intent to allow the refund without bond to taxpayers otherwise entitled thereto who "did not pass the tax on."

If, however, the construction indicated were deemed inadmissible and if, further, the provisions of (a) (2) of the section, separately considered, were construed to apply to the legal effect rather than the economics of the factual situation, the meaning of the several paragraphs of the section, when considered in relation to each other and in the light of its history, becomes doubtful. The ambiguity thus arising fully justifies us in looking beyond the words of the Act to ascertain the legislative intent. Finding in the report of the Committee referred to a manifest intent to prohibit refunds only to those who have not borne the burden of the tax, thereby preventing unjust enrichment of the manufacturer at the expense of the consumer, a proper regard for the rules of statutory construction requires us to give effect to the true legislative intent. Holy Trinity Church v. U. S., 143 U. S. 457; Danovitz v. U. S., 281 U. S. 389; American LaFrance Fire Engine Co. v. Riordan, supra. Accordingly, I hold that the plaintiff here, who has borne the burden of the tax, is not by this section precluded from recovery.

[fol. 50] The construction which I have indicated, it may be observed, follows that adopted in the case of Boyle Valve Co. v. U. S. rather than that suggested in the Electric Storage Battery Co. v. McCaughn, which, as I understand it, would require a finding by the Commissioner as to the facts involved in the section even after a final judgment by a court of competent jurisdiction. Such a construction would seem to be at variance with the underlying principles upon which the case of Graham & Foster v. Goodcell was decided.

It thus results that the defendant's motion claiming both a lack of jurisdiction and a lack of evidence to sustain the plaintiff's burden of proof on the factual requirements of Section 424 must be denied on both grounds, and the issue of fact involved must be resolved in favor of the plaintiff.

In any event, it should be noted that the burden of proof as to this issue was fully sustained by the plaintiff as to case No. 3371, dealing with a taxable period in 1922. It was not until in the midst of the ensuing period that the

plaintiff adopted the practice which necessitated the foregoing discussion as to the factual requirements (distinguished from the jurisdictional implications of Section 424.

It results that the plaintiff is entitled to judgment as follows: In case No. 3371, in the amount of $172,470.36 with interest from January 31, 1923; in case No. 3360, in the amount of $329,250.00 with interest from January 31, 1924; and in case No. 3421, in the amount of $98,416.41 with inter-
[fol. 51] est from July 31, 1924. Costs in each case to the plaintiff.

Ordered Accordingly.

Carroll C. Hincks, U. S. D. J.

March 5, 1932.

SCHEDULE "A"

Tax on Total Sales of Sizes Listed from July 1 to December 31, 1922

(Extracted from Plaintiff's Exhibit No. 52)

Sizes	Tax paid
30 x 3 ½	$66,227.15
30 x 3	11.04
32 x 4 ½	10,845.08
32 x 4	16,792.36
33 x 5	4,594.47
33 x 4	17,234.99
34 x 4 ½	11,318.06
34 x 5	1,029.57
35 x 5	8,690.77
35 x 4 ½	1,420.79
36 x 6	1,921.24
36 x 5	1,481.16
36 x 4	211.91
36 x 8	252.69
36 x 4 ½	619.48
36 x 3 ½	69.93
[fol. 52] 36 x 7	255.71
36 x 10	41.70
38 x 7	619.05
38 x 4	10.75
38 x 8	19.28

Sizes	Tax paid
38 x 3 ½	.00
38 x 6	4.89
40 x 8	890.40
40 x 5	246.07
40 x 6	180.45
40 x 10	.00
40 x 7	105.46
42 x 9	108.86
31 x 4	10,276.01
33 x 4 ½	8,141.47
34 x 6	.00
34 x 4	8,603.17
30 x 8	.00
35 x 4	180.58
38 x 10	.00
36 x 9	.00
36 x 12	.00
40 x 12	.00
40 x 3 ½	.00
40 x 9	5.00
42 x 5	.00
44 x 10	53.03
46 x 7	.00
48 x 8	.00
48 x 6	.00
60 x 4	.00
60 x 3 ½	.00
20 x 3 ½	7.79
	$172,470.36

[fol. 53] Tax on Total Sales of Sizes Listed from January 1 to December 31, 1923

(Extracted from Plaintiff's Exhibit No. 52)

Sizes	Tax paid
30 x 3 ½	$138,041.95
30 x 3	8.25
32 x 4 ½	25,538.71
32 x 4	37,703.45
33 x 5	10,177.09
33 x 4	24,282.05

Sizes	Tax paid
34 x 4 ½	16,583.63
34 x 5	1,862.09
35 x 5	13,294.16
35 x 4 ½	2,644.45
36 x 6	3,969.33
36 x 5	1,620.71
36 x 4	274.68
36 x 8	985.46
36 x 4 ½	607.36
36 x 3 ½	50.06
36 x 7	660.28
36 x 10	186.42
38 x 7	1,268.13
38 x 4	5.71
38 x 8	16.65
38 x 3 ½	.49
38 x 6	77.63
40 x 8	2,092.60
40 x 5	413.55
40 x 6	287.73
40 x 10	256.39
40 x 7	148.47
42 x 9	247.26
31 x 4	19,552.85
[fol. 54] 33 x 4 ½	16,191.03
34 x 6	113.74
34 x 4	9,531.24
30 x 8	.00
35 x 4	158.43
38 x 10	.00
36 x 9	58.07
36 x 12	41.90
40 x 12	193.83
40 x 3 ½	.00
40 x 9	9.24
42 x 5	.00
44 x 10	94.93
46 x 7	.00
48 x 8	.00
48 x 6	.00
60 x 4	.00

Sizes	Tax paid
60 x 3 ½	.00
20 x 3 ½	.00
	$329,250.00

Tax on Total Sales of Sizes Listed from January 1 to June 30, 1924

(Extracted from Plaintiff's Exhibit No. 52)

Sizes	Tax paid
30 x 3 ½	$52,804.76
30 x 3	.73
32 x 4 ½	7,954.42
32 x 4	10,705.24
33 x 5	2,371.65
[fol. 55] 33 x 4	4,783.29
34 x 4 ½	3,394.77
34 x 5	370.63
35 x 5	2,794.72
35 x 4 ½	266.44
36 x 6	1,411.59
36 x 5	400.07
36 x 4	88.63
36 x 8	204.41
36 x 4 ½	69.35
36 x 3 ½	8.17
36 x 7	228.03
36 x 10	36.28
38 x 7	354.48
38 x 4	14.46
38 x 8	3.13
38 x 5 ½	.23
38 x 6	25.39
40 x 8	643.84
40 x 5	338.40
40 x 6	36.95
40 x 10	50.16
40 x 7	48.78
42 x 9	49.16
31 x 4	4,283.95
33 x 4 ½	2,826.74

Sizes	Tax paid
34 x 6	35.19
34 x 4	1,717.50
30 x 8	.00
35 x 4	11.92
38 x 10	.00
36 x 9	5.17
36 x 12	18.21
40 x 12	34.81
[fol. 56] 40 x 3 ½	.38
40 x 9	.00
42 x 5	.00
44 x 10	21.58
46 x 7	.00
48 x 8	.00
48 x 6	.00
60 x 4	.00
60 x 3 ½	.00
20 x 3 ½	2.80
	$98,416.41

IN UNITED STATES DISTRICT COURT

No. 3360

[Title omitted]

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

The defendant requests the Court to find from the evidence adduced at the trial of this case, each of the following findings of fact.

[fol. 57] 1. The use to which tire chains, such as those involved in this case, are placed determines the design of such chains or chain grips.

2. Plaintiff has failed to show the specific design of tire chain required for each of the uses to which its chains or chain grips were actually used or placed during the taxable periods involved.

3. Plaintiff has failed to show the specific duty requirements of each of the uses to which its tire chains were used or placed during the taxable periods involved.

4. Plaintiff has failed to show the specific design of tire chain required for each of the uses, other than on the tires of automobile trucks, automobile wagons, other automobiles, etc., to which its tire chains were placed or used during the taxable periods involved.

5. Plaintiff has failed to show the specific duty requirements of each of the uses, other than on the tires of automobile trucks, automobile wagons, other automobiles, etc., to which its tire chains were used or placed during the taxable periods involved.

6. Plaintiff has failed to show the specific design of tire chains required for each of the uses, other than on the tires of automobile trucks, automobile wagons, other automobiles, etc., to which its tire chains were placed, or used dur-
[fol. 58] ing the prior years, were of the same design as is required for use on automobile trucks, automobile wagons and other automobiles, etc., during the taxable periods involved.

7. Plaintiff has failed to show the specific duty requirements of each of the uses, other than on the tires of automobile trucks, automobile wagons, other automobiles, etc., to which its tire chains were placed or used during the prior years, were the same as the duty requirements of automobile trucks, automobile wagons, other automobiles, etc., uses, during the taxable periods involved.

8. Plaintiff has failed to show the specific number of each size and type of the tire chains manufactured and sold by it for each use to which its tire chains were placed or used during the taxable periods involved, other than on the tires of automobile trucks, automobile wagons, other automobiles, etc.

9. Plaintiff has failed to show the specific number of each size and type of tire chains manufactured and sold by it, upon the sale of which the taxes in question were imposed, which it manufactured and sold for other uses than on the tires of automobile trucks, automobile wagons, other automobiles, etc., during the taxable periods involved.

10. Plaintiff has failed to show that each specific size and type of tire chains, upon the sale of which the tax was [fol. 59] imposed for the taxable periods involved, were not designed for use on the tires of automobile trucks, automobile wagons, other automobiles, etc.

11. Plaintiff has failed to show that each specific size and type of its tire chains, upon the sale of which the tax was imposed for the taxable periods involved, were not primarily adapted for use on the tires of automobile trucks, automobile wagons, other automobiles, etc.

12. Plaintiff advertised to its trade and the public, in bulletins, catalogues, price lists, etc., put out by it during the taxable periods involved, that each of the specific sizes and types of its tire chains, upon the sale of which the tax in question was imposed for the taxable periods involved, were adapted for use on the tires of each make of practically all makes of automobile trucks, automobile wagons, other automobiles, etc., in use.

13. The chief or principal use to which tire chains, such as involved in this case, of the specific sizes and types upon the sale of which the tax in question was imposed for the taxable periods involved, was on the tires of automobile trucks, automobile wagons, other automobiles, etc.

14. All of the tire chains or chain grips manufactured and sold by plaintiff, upon which the tax in question was imposed for the taxable periods involved, were designed for use on the tires of some make of automobile truck, automobile wagon, other automobile, etc.

[fol. 60] 15. All of the tire chains or chain grips manufactured and sold by plaintiff, upon the sale of which the tax in question was imposed for the taxable periods involved, were primarily adapted for use on the tires of some make of automobile truck, automobile wagon, other automobile, etc.

16. The tire chains or chain grips, upon the sale of which the tax in question was imposed for the taxable periods involved, were manufactured and sold by plaintiff to its jobbers and distributors and plaintiff has no knowledge of the use to which such chains or chain grips were actually placed or used when sold by such distributors and jobbers.

17. No tire chains, upon the manufacture and sale of which the tax in question was imposed for the taxable periods involved, were sold by plaintiff direct to Federal, State or municipal governmental agencies or any territorial subdivisions thereof, during the taxable periods involved.

18. Plaintiff manufactured and sold tire chains during the taxable periods of the same design as that contained in the "Weed Patent" introduced in evidence as Defendant's Exhibit "A", which were adaptable for use on automobile-as set forth in the printed matter contained in such design.

19. Plaintiff during the taxable periods did not manufacture and sell "Weed Chains" especially designed for use on fire apparatus, excavating shovels, ditch diggers, grad-
[fol. 61] ers, road scrapers, street sweepers, street sprinklers, and tractors.

20. That tire chains similar to those involved were manufactured, sold, and used on automobiles prior to the advent of the internal combustion tractor.

21. That tire chains similar to those involved were manufactured, sold and used on automobile trucks, prior to the advent of the internal combustion tractor.

22. The tire chains or chain grips in use on the automobile truck prior to the advent of the tractor were upon the advent of the tractor, sold for use on tractors.

Defendant's Request for Conclusions of Law.

The defendant requests the Court to make each of the following conclusions of law:

1. The tire chains manufactured and sold by plaintiff during the taxable periods involved, upon the sale of which the tax in question was imposed, were manufactured and sold as parts or accessories of an automobile truck, automobile wagon, other automobile, etc., within the meaning of the provisions of Sections 900 (3) of the Revenue Act of 1921 and 600.(3) of the Revenue Act of 1924.

[fol. 62] 2. The tire chains manufactured and sold by plaintiff during the taxable periods involved, upon the sale of which the tax in question was imposed, were designed for use on automobile trucks, automobile wagons, other automobiles, etc.

3. The tire chains manufactured and sold by plaintiff during the taxable periods involved, upon the sale of which the tax in question was imposed, were primarily adapted for use on the tires of automobile trucks, automobile wagons, other automobiles, etc.

4. The plaintiff has failed to sustain the burden of proof placed on it in this action in that it has failed to establish the illegality of the tax.

5. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund in this action for recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921.

6. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining this action, for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, subsequent to May 29, 1928.

7. The provisions of Section 424 of the Revenue Act of 1928 vest certain specific discretionary powers in the Commissioner of Internal Revenue which this Court is without [fol. 63] jurisdiction to determine or review.

8. The provisions of Section 424 (a) (1) of the Revenue Act of 1928 limit the jurisdiction of this court, to hear and determine the issues in an action for the recovery of manufacturer's excise taxes paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928.

9. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, which is exclusive of all other remedy.

10. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, regardless of the nontaxable claims of the plaintiff.

11. Defendant is entitled to judgment against the plaintiff and in favor of the defendant, dismissing plaintiff's petition at plaintiff's costs.

John Buckley, United States Attorney.

[fol. 64] IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

Law. No. 3360

AMERICAN CHAIN COMPANY, INCORPORATED, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue for the District of Connecticut, Defendant

JUDGMENT

The above entitled action, having been commenced by Writ, Summons and Complaint dated July 3, 1929, returnable to this court on the first Monday of September, 1929, the defendant's motion to dismiss having been denied, and Amendment to the Complaint, Answer and Reply having been filed—all as appears on file—was at a stated term of this court, held in and for the District of Connecticut at the Post Office Building in New Haven in said District on the 20th day of October, 1931, brought on for trial and tried before the Honorable Carroll C. Hincks, District Judge, pursuant to a stipulation of the parties in writing waiving a jury under Section 773 of Title 28 of the United States Code, and the court having heard the testimony of the parties and considered the briefs of counsel, rendered its decision on March 5, 1932, finding the issues for the plaintiff, and directing that judgment be entered for the plaintiff in [fol. 65] the amount of $329,250.00, with interest thereon from January 31, 1924,

Now, on motion of David S. Day, Attorney for the plaintiff, it is

Ordered, adjudged and decreed,

That the plaintiff recover of the defendant the sum of $329,250.00 with interest thereon from January 31, 1924,

according to law, and its costs taxed at $27.00.

Dated at New Haven, Connecticut, this 14 day of April, 1932.

Carroll C. Hincks, U. S. District Judge.

Approved as to form.

George H. Cohen, Assistant United States Attorney.

E. F. M. David S. Day, Attorney for Plaintiff.

[fol. 66] IN UNITED STATES DISTRICT COURT

Law. No. 3360

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE TO PREVENT EXECUTION AGAINST THE DEFENDANT

I, Carroll C. Hincks, District Judge of the United States and sitting in the District Court of the United States for the District of Connecticut, on the 14 day of April, 1932, do hereby certify as follows:

1. The above entitled action was commenced on the 3rd day of July, 1929, seeking the recovery of taxes paid by the plaintiff to the defendant. The taxes sought to be recovered amount to $352,111.51, with interest, and comprise manufacturer's excise tax under Title 9, Section 900, Subdivision 3 of the Act of Congress of the United States entitled Revenue Act of 1921, exacted by the defendant from the plaintiff for the year 1923, and paid by the plaintiff to the defendant, and by him paid into the Treasury of the United States. Upon the trial of said action, judgment was [fol. 67] on the 14 day of April, 1932, entered in favor of the plaintiff and against the defendant for the recovery of $329,250.00, and interest thereon from January 31, 1924, with costs taxed at $27.00.

2. The acts done by the said defendant in exacting and collecting the said tax as above set forth, and paying the same into the Treasury of the United States, were done in the performance of his official duties acting under the direction of the Secretary of the Treasury, or other proper officer of the United States Government, and the defend-

ant had probable cause for his acts, notwithstanding the fact that a part of said tax was erroneously collected and judgment has been rendered for a recovery thereof in said action as above set forth.

Carroll C. Hincks, United States District Judge.

Approved as to form:

George H. Cohen, Assistant United States Attorney.
Davis S. Day, Attorney for Plaintiff.

[fol. 68] IN UNITED STATES DISTRICT COURT

Law. No. 3360

[Title omitted]

ORDER ON FINDINGS AND CONCLUSIONS

Upon application of the United States Attorney for the District of Connecticut, it is hereby ordered, adjudged and decreed that the Findings of Fact and Conclusions of Law made by the Court and set forth in the order entered herein on March 5, 1932, for the purposes of and on appeal shall constitute Special Findings of Fact and Conclusions of Law.

Dated at New Haven, Connecticut, this 29th day of April, 1932.

Carroll C. Hincks, United States District Judge.

[fol. 69] IN UNITED STATES DISTRICT COURT

Law. No. 3360

[Title omitted]

ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS

The time for filing the Bill of Exceptions in this case, if an appeal is authorized to be taken on behalf of the Collector of Internal Revenue, is hereby extended to cover a period of three months from April 14th, 1932.

Dated at New Haven, Connecticut, this 25th day of April, 1932.

Carroll C. Hincks, United States District Judge.

[fol. 70] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

At Law. No. 3371

AMERICAN CHAIN COMPANY, INC., 929 Connecticut Avenue, Bridgeport, Connecticut, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue of the United States of America for the District of Connecticut, Hartford, Connecticut, Defendant

COMPLAINT

UNITED STATES OF AMERICA,

District of Connecticut, *ss:*

The President of the United States of America to the Marshal of the District of Connecticut, Greeting:

You are hereby commanded to summon Robert O. Eaton, the Collector of Internal Revenue for the District of Connecticut, of North Haven in the State and District of Connecticut, defendant herein, to appear before the District Court of the United States for the District of Connecticut on the 1st Monday of October, 1929, then and there to answer unto American Chain Company, Inc., a corporation under the laws of the State of New York, and having its principal office and place of business in Bridgeport in [fol. 71] the County of Fairfield and State of Connecticut, plaintiff herein, in a civil action wherein the plaintiff complains and says:

1. That the plaintiff, at all times hereinafter mentioned, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business in said City of Bridgeport in the State of Connecticut, and within

the United States Internal Revenue District of the State of Connecticut, and brings this action in its own right.

2. That the defendant is a citizen of the United States and a resident of said North Haven, County of New Haven, State of Connecticut, and was at all the times mentioned herein and now is a duly appointed, qualified and acting Collector of Internal Revenue of the United States of America for the District of Connecticut, in which District the City of Bridgeport is located.

3. That the plaintiff is and was at all times mentioned herein engaged in the manufacture and sale of tire chain grips, together with other commodities, and that said grips are and were sold for, and used on, solid and pneumatic tires of automotive vehicles, such as tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. That said grips were manufactured to fit the tires of automotive vehicles whether of tractors, fire engines, and vehicles not subject to the excise tax, or automobiles and trucks subject to tax within the purview of subdivision (3), Section 900 of Title IX, of the Revenue Act of 1921. That during the year 1922 it sold to its customers said tire chain grips having a general commercial [fol. 72] use other than on the tires of automobiles, trucks, and automobile wagons and paid tax thereon at 5% as and in the amount herein alleged.

4. That an excise tax at the rate of 5% under Title IX, Section 900, subdivision (3) of the Act of Congress of the United States, entitled "Revenue Act of 1921," was assessed against the plaintiff on sales of said tire chain grips and paid by it to the defendant as Collector of Internal Revenue of the United States of America, aggregating the sum of One hundred eighty-three thousand, three hundred sixty-five Dollars and forty-nine Cents ($183,365.49); that said payments made by plaintiff to defendant as its manufacturer's excise tax on the sales of tire chain grips made by it during the year 1922, were supposed by plaintiff to be due and payable to the United States of America and to said defendant as Collector of Internal Revenue, as demanded of plaintiff under and by virtue of said subdivision (3) of Section 900 of Title IX of said Revenue Act of 1921; that the following is a schedule showing the amounts of payments made by plaintiff as above set forth, the months

for which payments were made, and the dates on which the same were made:

1922	Amount of tax claimed as refunded	Date of payment
July	$8,205.73	Aug. 31, 1922
Aug.	16,981.38	Sept. 30, 1922
Sept.	28,821.01	Oct. 31, 1922
Oct.	30,528.43	Nov. 30, 1922
Nov.	40,555.84	Dec. 31, 1922
Dec.	58,273.10	Jan. 31, 1923
	$183,365.49	

[fol. 73] 5. That said tax represents 5% of the invoice price of all tire chain grips sold by the plaintiff from July 1 to December 31, 1922, inclusive; that said tax was not paid either directly or indirectly by the purchaser of said grips, but was paid entirely by the plaintiff and said grips were sold to the customers of plaintiff at a flat price and no amount for excise tax was included therein; that plaintiff did not increase the price of said chain grips by the amount of the excise tax, but absorbed said amount of tax without passing it on to the purchasers.

6. That on or about the 30th day of August, 1926, the plaintiff filed with the defendant its claim for refund of the amount of $183,365.49 so paid to the defendant as Collector of Internal Revenue and more particularly set forth in the above schedule of payments. That on or about the 23rd day of August, 1927, the Commissioner of Internal Revenue by notice to plaintiff rejected in full said claim for refund and refused to refund to plaintiff the said sum; that the defendant and the Commissioner of Internal Revenue have at all times since said date refused to refund to plaintiff the amount of said payments made by plaintiff to defendant as above set forth.

7. That said tire chain grips sold and used for the tires of automotive vehicles are of a design, shape, size and of dimensions exactly similar to chain grips used for the tires of tractors, fire engines and equipment, and similar vehicles [fol. 74] not subject to tax within the purview of subdivision (3), Section 900, of Title IX of the Revenue Act of 1921. That tire chain grips of exactly the same type

and specifications as those sold by plaintiff and tax paid during said period can be and are now commonly and profitably used upon both taxable and non-taxable automotive vehicles; that there is nothing in the design and construction of said grips sold by plaintiff as herein alleged to make them primarily adapted only for use on tires of automobiles, trucks or automobile wagons and that said grips may be and are used for other purposes and especially for the tires of tractors, fire engines and similar equipment; that the Commissioner of Internal Revenue has found as freely admitted to plaintiff that a substantial number of said tire chain grips were sold and used upon vehicles not subject to said tax but said Commissioner refuses to make refund of the tax paid as herein alleged on said grips so sold for the reason that the exact amount of sales therefor is not ascertainable; that said chain grips sold by plaintiff during said period were not sold or in connection with automobile trucks, automobile wagons, automobiles, and/or motorcycles, or in connection with the sale thereof; that said tire chain grips were not parts or accessories for automobile trucks, automobile wagons, other automobiles and/or motorcycles within the intent and meaning of Section 900, Title IX of the Revenue Act of 1921 or any subdivision thereof, but were in fact commercial commodities interchangeable as to use on both taxable and non-taxable vehicles, were so advertised and were commonly sold for such general purposes.

[fol. 75] Wherefore plaintiff prays judgment against the defendant in the amount of One hundred eighty-three thousand three hundred sixty-five Dollars and forty-nine Cents ($183,365.49), with interest as follows:

On $8,205.73, from Aug. 31, 1922.
On $16,981.38, from Sept. 30, 1922.
On $28,821.01, from Oct. 31, 1922.
On $30,528.43, from Nov. 30, 1922.
On $40,555.84, from Dec. 31, 1922.
On $58,273.10, from Jan. 31, 1923.

Philo C. Calhoun of Fairfield is recognized in the sum of $150.00 to prosecute, etc.

Hereof fail not, but of this writ, due service and return make.

Witness the Honorable Edwin S. Thomas, Judge of the District Court of the United States, for the District of Connecticut, and the seal of said Court, at New Haven in said District, the 17th day of August, A. D., 1929.

Know all men by these presents, that the undersigned, American Chain Company, Inc., a corporation under the laws of the State of New York and located at Bridgeport in the State of Connecticut, as principal, and Philo C. Calhoun of Fairfield in said State of Connecticut as surety, acknowledge themselves jointly and severally bound to Robert O. Eaton, Collector of Internal Revenue for the United States of America for the District of Connecticut, in a recognizance of One hundred fifty Dollars ($150) that the said American Chain Company, Inc., shall prosecute [fol. 76] the action which it has now commenced against the said Robert O. Eaton, Collector of Internal Revenue for the United States of America for the District of Connecticut, returnable on the first Monday of October, 1929, to the United States District Court for the District of Connecticut, to full effect, and that said American Chain Company, Inc., will pay any costs for which judgment may be rendered against it in said action.

Dated at Bridgeport, Connecticut, this 16th day of August, 1929.

American Chain Company, Inc., by A. M. Marsh, Its Attorney. Philo C. Calhoun.

A true copy. Attest:

C. E. Pickett, Clerk.

C. E. Pickett, Clerk of the District Court of the United States for the District of Connecticut.

David S. Day, Attorney for Plaintiff. Office and Post Office Address: 886 Main Street, Bridgeport, Connecticut. Long, Chamberlain and Nyce, of Counsel, Washington, D. C.

[fol. 77] NOTE RE MOTION TO DISMISS

No. 3371. Law

(The Motion to Dismiss in this case is exactly like the Motion to Dismiss in No. 3360 Law.)

IN UNITED STATES DISTRICT COURT

No. 3371. Law

[Title omitted]

ORDER OVERRULING DEFENDANT'S MOTION TO DISMISS

This action, by writ of complaint claiming $183,365.49 damages, came to this court on the first Monday of October, 1929 and thence to the present time, when the parties appeared and were at issue on the defendant's motion to dismiss as on file.

The court, having heard the parties, finds the issues for the plaintiff, and orders that the defendant's motion to dismiss be denied.

Dated at New Haven this 1st day of June, 1931.

Edwin I. Thomas.

[fol. 78] IN UNITED STATES DISTRICT COURT

No. 3371. Law

[Title omitted]

ANSWER

Paragraph one of plaintiff's petition is admitted except defendant denies plaintiff brings this action in its own right.

Paragraph two of plaintiff's petition is admitted.

With respect to paragraph three of plaintiff's petition, defendant admits and alleges that plaintiff is and was at all times mentioned herein engaged in the manufacture and sale of chain grips and that said grips are and were primarily designed, manufactured, advertised, sold for and used on solid and pneumatic tires of automotive vehicles such as automobile trucks, automobile wagons, other automobiles and motorcycles, but defendant denies such chain grips were sold for and used on tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. Further answering paragraph three defendant admits and alleges that said chain grips were designed, manufactured, advertised, and sold to fit the tires of automotive vehicles such

as automobile trucks, automobile wagons, other automobiles, and motorcycles as parts or accessories thereof with- [fol. 79] in the purview of Section 900 of the Revenue Act of 1921, but defendant denies that such grips were designed, manufactured and sold for use on tractors, fire engines and vehicles not subject to excise tax. Further answering paragraph three defendant admits and alleges that during the year 1923 plaintiff sold to its customers namely, jobbers and distributors, said chain grips primarily designed, manufactured, and advertised for use on automobile trucks, automobile wagons, other automobiles and motorcycles and that plaintiff paid tax thereon at the rate of 5% in the amount of $183,365.49, but defendant specially denies that said chain grips have or had a general commercial use and defendant specially denies said chain grips were sold for use or used on other than the tires of automobile trucks, automobile wagons, other automobiles, and motorcycles.

Paragraph four of plaintiff's petition is admitted.

Defendant denies the averments of paragraph five of plaintiff's petition and alleges that the tax in question represents the amount shown on the manufacturer's excise tax returns filed by and assessed against plaintiff for each of the taxable periods involved.

Paragraph six of plaintiff's petition is admitted.

Defendant denies the averments of paragraph seven of plaintiff's petition and alleges that the chain grips manufactured and sold by plaintiff during the taxable periods in question, upon the sale of which the tax in question was imposed, were primarily designed, manufactured, advertised, and sold for use on or in connection with automobile [fol. 80] trucks, automobile wagons, other automobiles, and motorcycles as parts or accessories thereof within the meaning of the provisions of Section 900 of the Revenue Act of 1921.

—— ——, Defendant, by John Buckley, United States Attorney; George H. Cohen, Assistant United States Attorney, His Attorneys.

IN UNITED STATES DISTRICT COURT

No. 3371. Law

[Title omitted]

PLAINTIFF'S REPLY

The plaintiff denies the allegations contained in the defendant's answer.

—— ——, Plaintiff, by Marsh, Stoddard & Day, Its Attorneys.

[fol. 81] NOTE RE STIPULATION WAIVING TRIAL BY JURY

No. 3371. Law

(The Stipulation Waiving Trial by Jury in this case is exactly like the Stipulation Waiving Trial by Jury in No. 3360 Law.)

NOTE RE DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

No. 3371. Law

The Defendant's Request for Findings of Fact and Conclusions of Law in this case is exactly like the Defendant's Request for Findings of Fact and Conclusions of Law in No. 3360 Law.

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR JUDGMENT

The defendant herein respectfully moves this court for judgment in favor of the defendant and against the plaintiff, for the following reasons:

[fol. 82] 1. Plaintiff has failed to show by the evidence the particular sales upon which it paid excise taxes, for the taxable periods July, 1922, to December, 1922, inclusive.

2. Plaintiff has failed to show by the evidence the particular sizes, types and weights of "Weed Chains" upon the sales of which excise taxes were imposed for the taxable periods July, 1922, to December, 1922, inclusive.

3. Plaintiff has failed to show by the evidence the numbers of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods July, 1922, to December, 1922, inclusive.

4. Plaintiff has failed to show by the evidence the amount of tax paid on sales of "Weed Chains" by the plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles for the taxable periods July, 1922, to December, 1922, inclusive.

5. Plaintiff has failed to show by the evidence the number, sizes, types and weights of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods July, 1922, to December, 1922, inclusive.

6. Plaintiff has failed to show by the evidence the "Weed Chains" manufactured and sold by it during the taxable periods, July, 1922, to December, 1922, inclusive, were not [fol. 83] designed to be attached to or used in connection with automobile trucks, automobile wagons or other automobiles to add to their utility or ornamentation.

7. Plaintiff has failed to show by the evidence the "Weed Chains" manufactured and sold by it during the taxable periods July, 1922, to December, 1922, inclusive, were not primarily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

8. Plaintiff has failed to sustain the burden of proof placed upon it in this action.

9. Plaintiff has failed to show by the evidence it has fully complied with the provisions of the Revenue Act of 1921 and Regulations 47 of the Treasury Department promulgated thereunder in that it has failed to avail itself of the exemption provisions of such Act and Articles 15 and 16 of such Regulations.

10. The evidence conclusively shows the "Weed Chains," manufactured and sold by plaintiff, during the taxable periods, July, 1922, to December, 1922, inclusive, the sale of which were taxed, were designed to be attached to or used in connection with automobile trucks, automobile wagons, or other automobiles, to add to their utility or ornamentation.

11. The evidence conclusively shows the "Weed Chains", manufactured and sold by plaintiff, during the taxable periods, July, 1922, to December, 1922, inclusive, were pri-
[fol. 84] marily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

12. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921.

13. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining this acton, for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, subsequent to May 29, 1928.

14. The provisions of Section 424 of the Revenue Act of 1928 vest certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review.

15. The provisions of Section 424(a) (1) of the Revenue Act of 1928 limit the jurisdiction of this court to hear and determine the issues in an action for the recovery of manufacturer's excise taxes paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928.

16. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufactur-
[fol. 85] er's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, which is exclusive of all other remedy.

17. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, regardless of the non-taxable claims of the plaintiff.

18. The plaintiff has failed to show by the evidence that the uses to which the "Weed Chains," manufactured and sold by it during the taxable periods, July, 1922, to December, 1922, inclusive, other than their use in connection with automobile trucks, automobile wagons, or other automobiles, required chains of the same design, type, size, weight, hardness, and tensile strength as is required for automobile truck, automobile wagon or other automobile uses.

19. Plaintiff has failed to show by the evidence that the tax in question in this action was imposed upon sales by its distributors, jobbers, or dealers to the consumer during the taxable periods July, 1922, to December, 1922, inclusive.

20. Plaintiff has failed to show by the evidence that the chains manufactured and sold by it during the taxable periods July, 1922, to December, 1922, were sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons or other automobiles.

E. F. McMahon.

[fol. 86] IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

No. 3371. Law

AMERICAN CHAIN COMPANY, INCORPORATED, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue for the District of Connecticut, Defendant

JUDGMENT

The above entitled action, having been commenced by writ, summons and complaint dated August 17, 1929, returnable to this court on the first Monday of September, 1929, the defendant's motion to dismiss having been denied, and amendment to the complaint, answer and reply having

been filed,—all as appears on file—was at a stated term of this court, held in and for the District of Connecticut at the Post Office Building in New Haven in said District on the 20th day of October, 1931, brought on for trial and tried before the Honorable Carroll C. Hincks, District Judge, pursuant to a stipulation of the parties in writing waiving a jury under Section 773 of Title 28 of the United States Code, and the court having heard the testimony of the parties and considered the briefs of counsel, rendered its decision on March 5, 1932, finding the issues for the plaintiff, and directing that judgment be entered for the [fol. 87] plaintiff in the amount of $172,470.36, with interest thereon from January 31, 1923,

Now, on motion of David S. Day, attorney for the plaintiff, it is ordered, adjudged and decreed that the plaintiff recover of the defendant the sum of $172,470.36 with interest thereon from January 31, 1923, according to law, and its costs taxed at $29.00.

Dated at New Haven, Connecticut, this 14 day of April, 1932.

Carroll C. Hincks, U. S. District Judge.

Approved as to form.
George H. Cohen, Assistant United States Attorney.
E. F. M. David S. Day, Attorney for Plaintiff.

[fol. 88] In United States District Court

No. 3371. Law

[Title omitted]

Certificate of Probable Cause to Prevent Execution Against the Defendant

I, Carroll C. Hincks, District Judge of the United States and sitting in the District Court of the United States for the District of Connecticut, on the 14 day of April, 1932, do hereby certify as follows:

1. The above entitled action was commenced on the 17th day of August, 1929, seeking the recovery of taxes paid by the plaintiff to the defendant. The taxes sought to be recovered amount to $183,365.49, with interest, and comprise

manufacturer's excise tax under Title 9, Section 900, Subdivision 3 of the Act of Congress of the United States entitled Revenue Act of 1921, exacted by the defendant from the plaintiff for the year 1922, and paid by the plaintiff to the defendant, and by him paid into the Treasury of the United States. Upon the trial of said action, judgment [fol. 89] was on the 14 day of April, 1932, entered in favor of the plaintiff and against the defendant for the recovery of $172,470.36, and interest thereon from January 31, 1923. with costs taxed at $29.00.

2. The acts done by the said defendant in exacting and collecting the said tax as above set forth, and paying the same into the Treasury of the United States, were done in the performance of his official duties acting under the direction of the Secretary of the Treasury, or other proper officer of the United States Government, and the defendant had probable cause for his acts, notwithstanding the fact that a part of said tax was erroneously collected and judgment has been rendered for a recovery thereof in said action as above set forth.

Carroll C. Hincks, United States District Judge.

Approved as to form.

George H. Cohen, Assistant United States Attorney.

David S. Day, Attorney for Plaintiff.

[fol. 90] IN UNITED STATES DISTRICT COURT

No. 3371. Law

[Title omitted]

ORDER ON FINDINGS AND CONCLUSIONS

Upon application of the United States Attorney for the District of Connecticut, it is hereby ordered, adjudged, and decreed that the Findings of Fact and Conclusions of Law made by the Court and set forth in the order entered herein on March 5, 1932, for the purposes of and on appeal shall constitute Special Findings of Fact and Conclusions of Law.

Dated at New Haven, Connecticut, this 29th day of April, 1932.

Carroll C. Hincks, United States District Judge.

NOTE RE ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS

No. 3371. Law

(The Order Extending Time for Filing Bill of Exceptions in this case is exactly like the Order Extending Time for Filing Bill of Exceptions in No. 3360 Law.)

[fol. 91] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

At Law. No. 3421

AMERICAN CHAIN COMPANY, INC., 929 Connecticut Avenue, Bridgeport, Connecticut, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue of the United States of America for the District of Connecticut, Hartford, Connecticut, Defendant

COMPLAINT

UNITED STATES OF AMERICA,
District of Connecticut, ss:

The President of the United States of America to the Marshal of the District of Connecticut, Greeting:

You are hereby commanded to summon Robert O. Eaton, the Collector of Internal Revenue for the District of Connecticut, of North Haven in the State and District of Connecticut, defendant herein, to appear before the District Court of the United States for the District of Connecticut on the first Monday of April, 1930, then and there to answer unto American Chain Company, Inc., a corporation under [fol. 92] the laws of the State of New York, and having its principal office and place of business in Bridgeport in the County of Fairfield and State of Connecticut, plaintiff herein, in a civil action wherein the plaintiff complains and says:

1. That the plaintiff, at all times hereinafter mentioned, was and now is a corporation duly organized and existing

under and by virtue of the laws of the State of New York, and having its principal office and place of business in said City of Bridgeport in the State of Connecticut, and within the United States Internal Revenue District of the State of Connecticut, and brings this action in its own right.

2. That the defendant is a citizen of the United States and a resident of said North Haven, County of New Haven, State of Connecticut, and was at all times mentioned herein and now is a duly appointed, qualified and acting Collector of Internal Revenue of the United States of America for the District of Connecticut, in which District the City of Bridgeport is located.

3. That the plaintiff is and was at all times mentioned herein engaged in the manufacture and sale of tire chain grips, together with other commodities, and that said grips are and were sold for, and used on, solid and pneumatic tires of automotive vehicles, such as tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. That said grips were manufactured to fit the tires of automotive vehicles whether of tractors, fire engines, and vehicles not subject to the excise tax, or automobiles and [fol. 93] trucks subject to tax within the purview of subdivision (3), Section 900 of Title IX, of the Revenue Act of 1921. That for the six months ended June 30, 1924, it sold to its customers said tire chain grips having a general commercial use other than on the tires of automobiles, trucks, and automobile wagons and paid tax thereon at 5% as and in the amount herein alleged.

4. That an excise tax at the rate of 5% under Title IX, Section 900, subdivision (3) of the Act of Congress of the United States, entitled "Revenue Act of 1921," was assessed against the plaintiff on sales of said tire chain grips and paid by it to the defendant as Collector of Internal Revenue of the United States of America aggregating the sum of One hundred five thousand thirty-one Dollars, and forty-three Cents ($105,031.43); that said payments made by plaintiff to defendant as its manufacturer's excise tax on the sales of tire chain grips made by it during said period, were supposed by plaintiff to be due and payable to the United States of America and to said defendant as Collector of Internal Revenue, as demanded of plaintiff under and by virtue of the said subdivision (3) of Section 900 of

Title IX of said Revenue Act of 1921; that the following is a schedule showing the amounts of payments made by plaintiff as above set forth, the months for which payments were made, and the dates on which the same were made:

[fol. 94]

1924	Amount of tax claimed as refund	Date of payment
January	$30,863.87	February 28, 1924
February	18,628.78	March 31, 1924
March	9,686.48	April 30, 1924
April	6,526.75	May 31, 1924
May	20,551.97	June 30, 1924
June	18,773.58	July 31, 1924
	$105,031.43	

5. That said tax represents 5% of the invoice price of all tire chain grips sold by the plaintiff from January 1st to June 30, 1924, inclusive; that said tax was not paid either directly or indirectly by the purchaser of said grips, but was paid entirely by the plaintiff at a flat price and no amount for excise tax was included therein; that plaintiff did not increase the price of said chain grips by the amount of the excise tax, but absorbed said amount of tax without passing it on to the purchasers.

6. That on or about the 15th day of February, 1928, the plaintiff filed with the defendant its claim for refund of the amount of $105,031.43, so paid to the defendant as Collector of Internal Revenue, and more particularly set forth in the above schedule of payments. That on or about the 15th day of March, 1928, the Commissioner of Internal Revenue by [fol. 95] notice to plaintiff rejected in full said claim for refund and refused to refund to plaintiff the said sum; that defendant and the Commissioner of Internal Revenue have at all times since said date refused to refund to plaintiff the amount of said payments made by plaintiff to defendant as above set forth.

7. That said tire chain grips sold and used for the tires of automotive vehicles are of a design, shape, size and of dimensions exactly similar to chain grips used for the tires of tractors, fire engines and equipment, and similar vehicles not subject to tax within the purview of subdivision (3), Section 900, of Title IX of the Revenue Act of 1921. That tire chain grips of exactly the same type and specifications

as those sold by plaintiff and tax paid during said period can be and are now commonly and profitably used upon both taxable and non-taxable automotive vehicles; that there is nothing in the design and construction of said grips sold by plaintiff as herein alleged to make them primarily adapted only for use on tires of automobiles, trucks or automobile wagons and that said grips may be and are used for other purposes and especially for the tires of tractors, fire engines and similar equipment; that the Commissioner of Internal Revenue has found and freely admitted to plaintiff that a substantial number of said tire chain grips were sold and used upon vehicles not subject to said tax but said Commissioner refuses to make refind of the tax paid as herein alleged on said grips so sold for the reason that the exact amount of sales therefor is not ascertainable; that said chain grips sold by plaintiff during said period were not [fol. 96] sold on or in connection with automobile trucks, automobile wagons, automobiles and/or motorcycles, or in connection with the sale thereof; that said tire chain grips were not parts or accessories for automobile trucks, automobile wagons, other automobiles and/or motorcycles within the intent and meaning of Section 900, Title IX of the Revenue Act of 1921 or any subdivision thereof, but were in fact commercial commodities interchangeable as to use on both taxable and non-taxable vehicles, were so advertised and were commonly sold for such general purposes.

Wherefore, plaintiff prays judgment against the defendant in the amount of One hundred five thousand thirty-one Dollars and forty-three Cents ($105,031.43), with interest as follows:

On $30,863.87 from February 28, 1924
On 18,628.78 from March 31, 1924
On 9,686.42 from April 30, 1924
On 6,526.75 from May 31, 1924
On 20,551.97 from June 30, 1924
On 18,773.58 from July 31, 1924

Arthur M. Marsh is recognized in the sum of $150.00 to prosecute, etc.

Hereof fail not, but of this writ, due service and return make.

Witness the Honorable Edwin S. Thomas, Judge of the District Court of the United States, for the District of Con-

[fol. 97] necticut, and the seal of said Court, at New Haven in said District, the 10th day of March, A. D. 1930.

C. E. Pickett, Clerk of the District Court of the United States for the District of Connecticut.

David S. Day, Attorney for Plaintiff. Office and Post Office address: 886 Main Street, Bridgeport, Connecticut. Long, Chamberlain & Nyce, Chas. P. Swindler, of Counsel, Washington, D. C.

NOTE RE MOTION TO DISMISS

No. 3421. Law

(The Motion to Dismiss in this case is exactly like the Motion to Dismiss in No. 3360 Law.)

[fol. 98] IN UNITED STATES DISTRICT COURT

No. 3421. Law

[Title omitted]

ORDER OVERRULING DEFENDANT'S MOTION TO DISMISS

This action, by writ and complaint claiming $105,031.43 damages, came to this court on the first Monday of April, 1930 and thence to the present time, when the parties appeared and were at issue on the defendant's motion to dismiss as on file.

The court having heard the parties, finds the issues for the plaintiff, and orders that the defendant's motion to dismiss be denied.

Dated at New Haven, this 1st day of June, 1931.

Edwin S. Thomas.

[fol. 99] IN UNITED STATES DISTRICT COURT

No. 3421. Law

[Title omitted]

ANSWER

Paragraph one of plaintiff's petition is admitted except defendant denies plaintiff brings this action in its own right.

Paragraph two of plaintiff's petition is admitted.

With respect to paragraph three of plaintiff's petition, defendant admits and alleges that plaintiff is and was at all times mentioned herein engaged in the manufacture and sale of chain grips and that said grips are and were primarily designed, manufactured, advertised, sold for and used on solid and pneumatic tires of automotive vehicles such as automobile trucks, automobile wagons, other automobiles and motorcycles, but defendant denies such chain grips were sold for and used on tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. Further answering paragraph three defendant admits and alleges that said chain grips were designed, manufactured, advertised, and sold to fit the tires of automotive vehicles such as automobile trucks, automobile wagons, [fol. 100] other automobiles, and motorcycles as parts or accessories thereof within the purview of Section 900 of the Revenue Act of 1921, but defendant denies that such grips were designed, manufactured and sold for use on tractors, fire engines and vehicles not subject to excise tax. Further answering paragraph three defendant admits and alleges that during the year 1923 plaintiff sold to its customers namely, jobbers and distributors, said chain grips primarily designed, manufactured, and advertised for use on automobile trucks, automobile wagons, other automobiles and motorcycles and that plaintiff paid tax thereon at the rate of 5% in the amount of $105,031.43, but defendant specially denies that said chain grips have or had a general commercial use and defendant specially denies said chain grips were sold for use or used on other than the tires or automobile trucks, automobile wagons, other automobiles, and motorcycles.

Paragraph four of plaintiff's petition is admitted.

Defendant denies the averments of paragraph five of plaintiff's petition and alleges that the tax in question represents the amount shown on the manufacturer's excise tax returns filed by and assessed against plaintiff for each of the taxable periods involved.

Defendant denies the averments of paragraph seven of plaintiff's petition and alleges that the chain grips manufactured and sold by plaintiff during the taxable periods in question, upon the sale of which the tax in question was imposed, were primarily designed, manufactured, adver-

tised, and sold for use on or in connection with automobile [fol. 101] trucks, automobile wagons, other automobiles, and motorcycles as parts or accessories thereof within the meaning of the provisions of Section 900 of the Revenue Act of 1921.

——, Defendant, by John Buckley, United States Attorney; George H. Cohen, Assistant United States Attorney, His Attorneys.

IN UNITED STATES DISTRICT COURT

No. 3421. Law

[Title omitted]

PLAINTIFF'S REPLY

The plaintiff denies the allegations contained in the defendant's answer.

——, Plaintiff, by Marsh, Stoddard & Day, Its Attorneys.

[fol. 102] NOTE RE STIPULATION WAIVING TRIAL BY JURY

No. 3421. Law

(The Stipulation Waiving Trial by Jury in this case is exactly like the Stipulation Waiving Trial by Jury in No. 3360 Law.)

NOTE RE DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

No. 3421. Law

(The Defendant's Request for Findings of Fact and Conclusions of Law in this case is exactly like the Defendant's Request for Findings of Fact and Conclusions of Law in No. 3360 Law.)

IN UNITED STATES DISTRICT COURT

No. 3421

[Title omitted]

MOTION FOR JUDGMENT

The defendant herein respectfully moves this court for judgment in favor of the defendant and against the plaintiff, for the following reasons:

[fol. 103] 1. Plaintiff has failed to show by the evidence the particular sales upon which it paid excise taxes, for the taxable periods January, 1924, to June, 1924, inclusive.

2. Plaintiff has failed to show by the evidence the particular sizes, types and weights of "Weed Chains" upon the sales of which excise taxes were imposed for the taxable periods January, 1924, to June, 1924, inclusive.

3. Plaintiff has failed to show by the evidence the numbers of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods January, 1924, to June, 1924, inclusive.

4. Plaintiff has failed to show by the evidence the amount of tax paid on sales of "Weed Chains" by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles for the taxable periods January, 1924, to June, 1924, inclusive.

5. Plaintiff has failed to show by the evidence the number, sizes, types and weights of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods January, 1924, to June, 1924, inclusive.

6. Plaintiff has failed to show by the evidence the "Weed Chains" manufactured and sold by it during the taxable periods, January, 1924, to June, 1924, inclusive, were not [fol. 104] designed to be attached to or used in connection with automobile trucks, automobile wagons or other automobiles to add to their utility or ornamentation.

7. Plaintiff has failed to show by the evidence the "Weed Chains" manufactured and sold by it during the taxable

periods January, 1924, to June, 1924, inclusive, were not primarily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

8. Plaintiff has failed to sustain the burden of proof placed upon it in this action.

9. Plaintiff has failed to show by the evidence it has fully complied with the provisions of the Revenue Act of 1921 and Regulations 47 of the Treasury Department promulgated thereunder in that it has failed to avail itself of the exemption provisions of such Act and Articles 15 and 16 of such Regulations.

10. The evidence conclusively shows the "Weed Chains", manufactured and sold by plaintiff during the taxable periods, January, 1924, to June, 1924, inclusive, the sales of which were taxed, were designed to be attached to or used in connection with automobile trucks, automobile wagons or other automobiles, to add to their utility or ornamentation.

11. The evidence conclusively shows the "Weed Chains", manufactured and sold by plaintiff during the taxable periods, January, 1924, to June, 1924, inclusive, were pri- [fol. 105] marily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

12. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921.

13. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining this action, for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, subsequent to May 29, 1928.

14. The provisions of Section 424 of the Revenue Act of 1928 vest certain specified discretionary powers in the Com-

missioner of Internal Revenue which this Court is without jurisdiction to determine or review.

15. The provisions of Section 424(a) (1) of the Revenue Act of 1928 limit the jurisdiction of this court, to hear and determine the issues in an action for the recovery of manufacturer's excise taxes paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928.

16. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, which is exclusive of all other remedy.

[fol. 106] 17. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, regardless of the non-taxable claims of the plaintiff.

18. The plaintiff has failed to show by the evidence that the uses to which the "Weed Chains", manufactured and sold by it during the taxable periods, January, 1924, to June, 1924, inclusive, other than their use in connection with automobile trucks, automobile wagons or other automobiles, required chains of the same design, type, size, weight, hardness, and tensile strength as is required for automobile truck, automobile wagon or other automobile uses.

19. Plaintiff has failed to show by the evidence that the tax in question in this action was imposed upon sales by its distributors, jobbers, or dealers to the consumer during the taxable periods January, 1924, to June, 1924, inclusive.

20. Plaintiff has failed to show by the evidence that the chains manufactured and sold by it during the taxable periods January, 1924, to June, 1924, were sold by plaintiff to the consumer for use other than autombile trucks, automobile wagons or other automobiles.

E. F. McMahon.

[fol. 107] IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

No. 3421. Law

AMERICAN CHAIN COMPANY, INCORPORATED, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue for the District of Connecticut, Defendant

JUDGMENT

The above entitled action, having been commenced by writ, summons and complaint dated March 10, 1930, returnable to this court on the first Monday of April, 1930, the defendant's motion to dismiss having been denied, and Amendment to the complaint, answer and reply having been filed—all as appears on file—was at a stated term of this court, held in and for the District of Connecticut at the Post Office Building in New Haven in said district on the 20th day of October, 1931, brought on for trial and tried before the Honorable Carroll C. Hincks, District Judge, pursuant to a stipulation of the parties in writing waiving a jury under Section 773 of Title 28 of the United States Code, and the court having heard the testimony of the parties and considered the briefs of counsel, rendered its decision on March 5, 1932, finding the issues for the plaintiff, and directing that judgment be entered for the plaintiff in [fol. 108] the amount of $98,416.41, with interest thereon from July 31, 1924,

Now, on motion of David S. Day, attorney for the plaintiff, it is

Ordered, adjudged and decreed that the plaintiff recover of the defendant the sum of $98,416.41 with interest thereon from July 31, 1924, according to law, and its costs taxed at $27.00.

Dated at New Haven, Connecticut, this 14th day of April, 1932.

Carroll C. Hincks, U. S. District Judge.

Approved as to form.
George H. Cohen, Assistant United States Attorney.
E. F. M. David S. Day, Attorney for Plaintiff.

[fol. 109] IN UNITED STATES DISTRICT COURT

No. 3421. Law

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE TO PREVENT EXECUTION AGAINST THE DEFENDANT

I, Carroll C. Hinks, District Judge of the United States and sitting in the District Court of the United States for the District of Connecticut, on the 14th day of April, 1932, do hereby certify as follows:

1. The above entitled action was commenced on the 10th day of March, 1930, seeking the recovery of taxes paid by the plaintiff to the defendant. The taxes sought to be recovered amount to $105,031.48, with interest, and comprise manufacturer's excise tax under Title 9, Section 900, Subdivision 3 of the Act of Congress of the United States entitled Revenue Act of 1921, exacted by the defendant from the plaintiff for the year 1924, and paid by the plaintiff to the defendant, and by him paid into the Treasury of the United States. Upon the trial of said action, judgment was [fol. 110] on the 14th day of April, 1932, entered in favor of the plaintiff and against the defendant for the recovery of $98,416.41, and interest thereon from July 31, 1924, with costs taxed at $27.00.

2. The acts done by the said defendant in exacting and collecting the said tax as above set forth, and paying the same into the Treasury of the United States, were done in the performance of his official duties acting under the direction of the Secretary of the Treasury, or other proper officer of the United States Government, and the defendant had probable cause for his acts, notwithstanding the fact that a part of said tax was erroneously collected and judgment has been rendered for a recovery thereof in said action as above set forth.

Carroll C. Hincks, United States District Judge.

Approved as to form.

George H. Cohen, Assistant United States Attorney.
David S. Day, Attorney for Plaintiff.

[fol. 111] IN UNITED STATES DISTRICT COURT

No. 3421. Law

[Title omitted]

ORDER ON FINDINGS AND CONCLUSIONS

Upon application of the United States Attorney for the District of Connecticut, it is hereby ordered, adjudged and decreed that the Findings of Fact and Conclusions of Law made by the Court and set forth in the Order entered herein on March 5, 1932, for the purposes of and on appeal shall constitute Special Findings of Fact and Conclusions of Law.

Dated at New Haven, Connecticut, this 29th day of April, 1932.

Carroll C. Hincks, United States District Judge.

NOTE RE ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS

No. 3421. Law

(The Order Extending Time for Filing Bill of Exceptions in this case is exactly like the Order Extending Bill of Exceptions in No. 3360 Law.)

[fol. 112] IN UNITED STATES DISTRICT COURT

Nos. 3360, 3371, 3421. Law

[Title omitted]

PETITION FOR APPEAL—Filed July 14, 1932

To the Honorable Carroll C. Hincks, District Judge:

The above-named defendant, feeling aggrieved by the decree rendered and judgment entered in each of the above-entitled cases on the 14th day of April, A. D., 1932, in favor of the plaintiff and against the defendant, does hereby appeal from said decree and judgment entered in each of the above-entitled cases to the Circuit Court of Appeals for

the Second Circuit for the reasons set forth in the assignment of errors filed herewith, and defendant prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree and judgment entered in each of the above-entitled cases was based, duly authenti- [fol. 113] cated, be sent to the United States Circuit Court of Appeals for the Second Circuit, under the rules of such court in such cases made and provided, and that such other and further proceedings be had as may be proper in the premises.

John Buckley, United States Attorney.

Copy duly served on plaintiff.

E. F. McM.

IN UNITED STATES DISTRICT COURT

Nos. 3360, 3371, 3421. Law

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 14, 1932

On the application and motion of John Buckley, United States Attorney for the District of Connecticut, of counsel [fol. 114] for defendant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Second Circuit, from the decree and judgment entered in each of the above-entitled cases on the 14th day of April, A. D. 1932, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, documents and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Second Circuit, and that such other and further proceedings be had as may be proper in the premises.

Edwin S. Thomas, United States District Judge.

Copy duly served on plaintiff.

E. F. McM.

[fols. 115 & 116] Citation in usual form, showing service on David S. Day, omitted in printing.

[fol. 117] IN UNITED STATES DISTRICT COURT

Law. Numbers 3360, 3371, 3421

[Title omitted]

ORDER CONSOLIDATING CASES FOR APPEAL—Filed July 14, 1932

Upon application of the United States Attorney, it is hereby ordered, adjudged and decreed that the above entitled actions be consolidated for and on appeal under one cover.

Edwin S. Thomas, United States District Judge.

Approved.

John Buckley, United States Attorney.

[fol. 118] IN UNITED STATES DISTRICT COURT

Law. Numbers 3360, 3371, 3421

[Title omitted]

ORDER FOR WITHDRAWAL OF EXHIBITS FOR TRANSMISSION TO UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT—Filed July 14, 1932

Upon application of defendant to transmit the exhibits offered in the above-entitled actions, to the Circuit Court of Appeals, as physical exhibits and not to be printed in full in the transcript of record, it is considered by the Court to be necessary and proper because of the size and volume thereof, that the plaintiff's and defendant's exhibits offered in evidence at the trial of the above-entitled actions, or such thereof as may be determined by counsel for both parties as necessary in the presentation of their respective contentions, should be transmitted as original papers and exhibits to the United States Circuit Court of Appeals for the Second Circuit.

It is therefore ordered, adjudged and decreed that all of [fol. 119] plaintiff's and defendant's exhibits offered in evidence at the trial of the above-entitled actions, or such thereof as both parties may deem necessary, be withdrawn from the Clerk of this Court and transmitted by the Clerk

of this Court to the Second Circuit Court of Appeals, to be inspected in that Court upon review without being printed in the Transcript of Record, Rule 13, Paragraph 5, United States Circuit Court of Appeals for Second Circuit.

Edwin S. Thomas, United States District Judge.

Approved.

E.F.McM.

[fol. 120] IN UNITED STATES DISTRICT COURT

Nos. 3360, 3371, 3421. Law

[Title omitted]

ORDER APPROVING DEFENDANT'S NARRATIVE FORM BILL OF EXCEPTIONS—Filed July 14, 1932

This 14th day of July, A. D. 1932, the bill of exceptions in each and all of the above-entitled causes was presented to the Court, the same having been delivered to the clerk by the excepting party in conformity with the Rules of this Court, no objections thereto having been filed, the Court, upon consideration thereof and in conformity with the suggestions of counsel for both parties, has allowed and signed and ordered the said bill of exceptions to be filed in these cases as a true, correct and complete narrative form bill of exceptions, this 14th day of July, A. D. 1932.

Edwin S. Thomas, United States District Judge.

Approved as to form.

——— ———, Counsel for Plaintiff.

[fol. 121] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Nos. 3360, 3371, 3421. Law

AMERICAN CHAIN COMPANY, INC., Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue, District of Connecticut, Defendant

Defendant's Narrative Form Bill of Exceptions

Be it remembered that on the trial of the above entitled causes, consolidated by agreement of counsel, in the Dis-

trict Court of the United States, District of Connecticut, at the October 1931 Term thereof, before Honorable Carroll S. Hincks, one of the Judges of said Court and a jury, wherein at the close of plaintiff's case, at the suggestion of the Court, both parties waived in writing their right to trial by jury, and the remainder of the evidence and the issues, both of fact and of law, were submitted to the Court for decision, the following proceedings were had:

[fol. 122] APPEARANCES

On behalf of the plaintiff, Chester I. Long, Esq., and Charles P. Swindler, Esq., of Long, Chamberlain & Nyce, Washington, D. C., and David S. Day, Esq., of Marsh, Stoddard & Day, Bridgeport, Connecticut, of Counsel.

On behalf of the defendant, John Buckley, Esq., United States Attorney, George H. Cohen, Esq., Ass't U. S. Attorney, Hartford, Connecticut and E. F. McMahon, Esq., Special Attorney, General Counsel's Office, Bureau of Internal Revenue, Washington, D. C., of Counsel.

The Court: An order may be entered consolidating Law Cases No-. 3360, 3371 and 3421 for trial in conformity with agreement of Counsel. Preliminary statements to panel waived by both parties.

STATEMENT TO JURY

GENTLEMEN OF THE JURY, the cases that are going to be presented to you this morning are cases in which the American Chain Company, Inc., of Bridgeport, Connecticut, is suing Robert O. Eaton, the Collector of Internal Revenue of the United States for the Collection District of Connecticut, for a very substantial recovery of taxes, which have heretofore been paid to the Government by the American Chain Company, under the claim that the taxes were illegally exacted. Both parties are represented by Counsel. If any of you gentlemen are stockholders in the American [fol. 123] Chain Company or if any of you are employed by it or have business relations with it or if any of you are personally acquainted with or have or have had dealings or relations with any of Counsel, you will make that fact known now. (At this point further discussion took place between the Court and Talesmen with reference to their qualifications to serve.)

Thereupon the Jury was then drawn and duly sworn by Clerk Pickett and statements of the cases were made by Counsel for the respective parties.

The Court: Exceptions may be entered for defendant to the order of Judge Thomas overruling defendant's motion to dismiss each of these cases as entered on the fifth day of February, 1931.

PLAINTIFF'S TESTIMONY

WILLIAM THOMAS MORRIS, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Long:

My name is William Thomas Morris, Vice President and General Manager of the American Chain Company. The common usual name for the tire chains involved in this suit is Weed Chains. I have been engaged in making Weed Chains since about 1905. The American Chain Company was incorporated about 1910 or 1911 as successor to the Weed Chain Tire Grip Company. The American Chain [fol. 124] Company was making Weed Chains from July 1, 1922 to June 30, 1924. I am personally familiar with the kind and character of Weed Chains made during that period. I supervised the organization during that time and had my trips through the assembling rooms and plant. I have been familiar with the making of those chains ever since my employment about 1905. I have been General Manager since about 1917. The chains made from July 1922 to July 1924, were similar in design and make to those that are manufactured by the company at the present time, October, 1931. Chains were manufactured that would fit the standard makes of tires of all automobiles, trucks, and road machines, regardless of their use. Weed Chains were manufactured and sold for use on motor vehicles of all kinds. I have in the courtroom samples of the representative sizes of these Weed Chains. In 1905 I put the chains together myself as the only employee, then we later had two employees and developed a business employing 175 employees. I stretched two pieces of side chain along a table and

threaded the cross members into the side chain and then pinched them down with a bolt cut. In 1910 or 1911 we built the plant at Bridgeport, Connecticut and purchased the chain interest of the Oneida Community Company of Oneida, New York. They were makers of the weldless chain we used for side members. In 1914 or 1915 we purchased the Standard Chain Company, York, Pa., manufacturers of the cross chain, that is of the cross members. After the plant moved from New York to Bridgeport, I went to the Pacific Coast states for five months on the supervision of [fol. 125] sales and at the same time did the practical patent work for the company. During 1922 to 1924 we were making these Weed Chains at Bridgeport, Connecticut and York, Pennsylvania. During this period I was supervising sales as well as the manufacture. The method and plan or policy of our sales during July 1922 to July 1924 was that we sold all of our goods direct to the jobber, who in turn sold them to the dealer, who in turn sold them to the consumer. That was the method and policy of selling at that time and it is today. In carrying out that policy or method of sales, I travelled throughout the United States, Canada and Continental Europe. I spent five months in England handling the Company's affairs and selling the tire chains. Plaintiff's Exhibit 1, consisting of a bag containing one pair of chains, was identified by the witness as Weed Tire Chains similar to those made during the taxable periods and offered and received in evidence. Those chains are stamped on hook, size 30 x 3½ and made to fit 30 x 3½ tires. The size of the chains always follow the size of the tires. The chains are laid over the top of the tire, the wheel is run over the chain a short length and they are hooked at the bottom. Any person, skilled or unskilled, can put them on as a rule. Plaintiff's Exhibit 2, consisting of a bag containing one pair of Weed Tire Chains for a 34 x 4.95 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 3, consisting of a bag containing one pair of Weed Tire Chains for a 35 x 5 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 4, consisting of a bag containing one pair of [fol. 126] Weed Tire Chains for a 35 x 5 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 5, consisting of a bag containing one pair of Weed Tire Chains for a 36 x 6 tire as identified by the

witness was offered and received in evidence. Plaintiff's Exhibit 6, consisting of a bag containing one pair of Weed Tire Chains for a 40 x 8 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 7, consisting of a bag containing one pair of Weed Tire Chains for a 36 x 6 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 8, consisting of a bag containing one pair of Weed Tire Chains for a 40 x 5 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibits 1, 2 and 3 are marked Weeds, meaning Weed tire chains, Exhibits 4, 5 and 6 are for single pneumatic tires. Exhibit 7 is for dual pneumatic tires. A dual pneumatic is where two single pneumatic tires are mounted on one rim of the automobile wheel. A single pneumatic tire chain is for one single pneumatic tire and a dual pneumatic tire chain is for a dual pneumatic tire. The difference in the single and dual pneumatic tire chains is that the dual is wider and covers two tires. Exhibit 8 is for a 40 x 6 single solid tire. Plaintiff's Exhibit 9, consisting of a bag containing one pair of Weed Tire Chains for a 40 x 6 single solid tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 10, consisting of a bag containing one pair of Weed Tire Chains for a 40 x 10 single solid tire or a 40 x 5 dual solid tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 11, consisting of [fol. 127] a bag containing one pair of Weed Tire Chains for a 40 x 14 single solid tire or a 40 x 7 dual solid tire as identified by the witness was offered and received in evidence. A Weed Chain of an appropriate size will fit a tractor tire of the same size as the truck tire. A suitable size will fit just as well on the tractor tire as it will on the truck tire. As salesman and supervisor of sales I observed the use of these Weed Chains we manufactured when in different parts of the United States.

Q. Had the above size of Weed chains for use on automobiles or trucks any peculiar characteristics which were not identical with Weed chains for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to the question for the reason the witness has not shown himself qualified to answer; it is not the best evidence; it

calls for a conclusion of the witness; assumes facts to be true which have not been shown by the evidence and usurps the power of the jury.

The Court: I understand the question asks for physical differences, if any, between the two chains.

Mr. McMahon: If the Court please, I can see your view of the question asked but the question that is bothering me is: Does that lead to the question of design or does it specifically refer to particular sizes of chains. In other words the question is too general to apply to anything other [fol. 128] than design. Peculiar characteristics are part of design and this witness certainly isn't qualified to testify as to that.

Mr. Long: This witness is qualified to testify as to design. They had to make a chain.

The Court: I will allow the question.

Mr. McMahon: May I ask one question. What are "the above chains."

Mr. Long: The above sizes. We have had the size here—the above sizes of Weed Chains.

Mr. McMahon: Note an exception to the question ruling.

A. No, they did not.

The Weed Chains manufactured and sold by us during the taxable periods could be detached from automobile or truck tires and used on tires of the same size on tractors, fire apparatus or road machines without any change in the chains.

Q. Were the Weed Chains manufactured and sold by the American Chain Company upon which the taxes in this suit were paid, interchangeable for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to that question as applied.

The Court: I will admit it.

Mr. McMahon: Note an exception on the ground that the witness had not shown himself qualified to answer; it calls for a conclusion of the witness; assumes facts to be true [fol. 129] that are not shown by the evidence; is not the best evidence and usurps the power of the jury with respect to use.

The Court: Exception noted.

A. They were.

Q. Were suitable sizes of such Weed Chains manufactured and sold during the taxable periods, used generally on automobiles and trucks, interchangeable for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to that question for the reason that the witness has not shown himself qualified to answer; it calls for the conclusion of the witness; assumes facts to be true that are not shown by the evidence; it is not the best evidence obtainable; and usurps the power of the jury.

The Court: Admitted.

Mr. McMahon: Note an exception.

The Court: Exception noted. You may answer.

A. They were.

The American Chain Company sold no Weed Chains with the car; they were all sold through the jobber. The American Chain Company is the sole owner of the claims involved in these three suits No action has been had thereon before Congress or any Governmental Department, except on claims filed and rejected and no part of such claims have ever been sold or assigned. The same remain unpaid with [fol. 130] interest due from dates of payment. During the taxable periods there was no difference in our selling policy in one part of the United States and Canada from the way we did business in another part. We sold these chains everywhere through jobbers. There were no differences in the kind or sizes of Weed Chains that we sold in one part of the United States and Canada from what we sold in any other part. We sold Weed Chains in Continental Europe, Australia and South Africa. We had a different branch in England. We called it a different name than the Weed Tire Chain. It was the Parsons non-skid chain. It was somewhat different in construction from those we sold in the United States. There was no difference in the general use of Weed Chains in foreign countries from their use in the United States. I have seen Weed Chains used in all parts of the United States and Canada. I have seen Weed chains used on tractors and I am familiar with the requirements of that use. I can state the different requirements of tractor use to the extent that it is necessary for traction to stop

wheels slipping and cause the vehicle to go ahead. Plaintiff's Exhibits 1 to 11, inclusive, have all been made since June 30, 1924. They are similarly representative of all of the Weed Chains made during the taxable periods. Chains of similar sizes to the ones introduced in evidence as Exhibits 1 to 11, inclusive, were used on trucks, fire engines and road machines during the periods July 1922 to July 1924.

Cross-examination.

By Mr. McMahon:

I started assembling chains for the Weed Chain Tire Grip [fol. 131] Company in 1905. The internal combustion automobile was in use at that time. I wouldn't say positively that the Internal Combustion Truck or tractor was in use at that time. I handled patents for the company from a practical standpoint for certain periods of time. By that I mean gathering evidence for patent cases back and forth across the country. I have seen the letters patent taken out by Mr. Weed, but it is sometime since.

Q. Can you tell me about when the base patent on these tire chains was taken out?

A. You mean the Weed patent.

Q. (Last question read by the reporter.)

A. You mean the Weed Patent.

Q. Yes.

Mr. Long: We object to that unless it is shown that the Weed patent was the basic patent. Will you state that that was the basic patent?

Mr. McMahon: I am asking him a question. I want to know if he knows.

A. Why, if you ask me about the Weed patent I think the application was made in 1903 and issued in 1904. That is from memory, of course.

Q. Mr. Morris, I hand you what has been marked Defendant's Exhibit A and ask you to state what that is.

A. It is a grip tread for pneumatic tires, Patent No. 768,495, issued to Harry D. Weed under date of August 23, 1904.

Q. I hand you what has been marked Defendant's Exhibit B and ask you to state what that is.

A. Patent No. 723,299, issued to Harry Parsons under date of March 24, 1903.

[fol. 132] Q. Did you ever handle that patent? Did you have anything to do with it?

A. I have seen this patent in the early days.

Q. Do you know about it?

A. Yes, I do.

Q. Did you ever have anything to do with those letters patent in your handling of letters patent for the American Chain Company?

A. In 1915, I consummated the purchase of these patents in England.

Q. I hand you what has been marked Defendant's Exhibit C and ask you to state what that is.

A. It is Patent 953,673, issued to H. D. Weed, March 29, 1910, and was for an improvement on Weed tire chains.

Q. I hand you what has been marked Defendant's Exhibit D and ask you to state what that is.

A. It is Patent 1,030,032, issued to F. A. Strong under date of June 18, 1912 and it was called a blowout chain on a tire repair device.

Q. Did you ever have anything to do with that patent in your duties in connection with patents of the American Chain Company?

A. Yes, I did. We assembled this. I assembled this.

Q. I hand you what has been marked Defendant's Exhibit E and ask you to state what that is.

A. It is Patent 1,104,307, issued to H. W. Loder under date of January 24, 1922.

Q. Did you ever have anything to do in connection with that patent?

A. I don't remember anything about this construction at all.

Q. Is there any question in your mind as to whether or not this patent was obtained or assigned to the American Chain Company?

A. It says it was assigned to the American Chain Company on the top there.

[fol. 133] Q. Do you have the original letters patent represented by these Exhibits A, B, C, D, and E, in your possession?

A. Not in my possession. We have them, however, in the office—in our own office.

Q. Could you produce those letters patent or would you be willing to admit that Exhibits A, B, C, D and E are true copies or representations of what that purports to be as identified by you?

A. We can secure those in the office at Bridgeport—the original patents.

Q. Will you secure them for us tonight and have them here for us tomorrow?

A. Yes, sir.

I testified on direct examination that during the taxable periods I supervised directly as general manager the sales made and also testified as to the selling policy. During the taxable periods, we advertised these Weed Chains for sale to both the jobber and the public.

Mr. McMahon: Is it the rule for the defendant to offer evidence on cross examination?

The Court: Unless it is otherwise admissible.

Mr. McMahon: Very well, the defendant offers in evidence Defendant's Exhibits A, B, C, D and E as identified by this witness.

Mr. Long: Now we object to them because it is not proper cross examination. Second, because outside of the Parsons Patent, the chains for which taxes were assessed and which the demand is made for the refund during this period were not manufactured under any of these patents except the [fol. 134] Parsons patent. I don't know as to these other patents. We never had a chance to examine them.

Mr. Long: We make the objection as to all of them except the Parsons patent and if necessary we desire to ask some preliminary question of the witness.

The Court: Objection sustained.

Mr. McMahon: An exception on behalf of the defendant.

Mr. Long: We don't object to Defendant's Exhibit B, the Parsons Patent on any ground.

Mr. McMahon: The defendant excepts to the exclusion of Defendant's Exhibits A, C, D and E.

The Court: The exhibits so excluded will be marked for identification only.

Defendant's Exhibit F, a price list of Weed Chains for pneumatic and solid truck tires, put out by the American Chain Company, in effect April 18, 1923, and circulated to

its trade, as identified by the witness offered and admitted in evidence. Defendant's Exhibit G, a Weed chain circular for solid tires, as identified by the witness, marked for identification. Defendant's Exhibit H, a catalogue issued December 1, 1923, as to prices being effective on tire chains, cross chains, both solid and pneumatic, and unit chains, chain adjusters—issued effective December 1, 1923, as identified by the witness, offered and admitted in evidence. Defendant's Exhibit I, a pamphlet of Weed chains for Fordson tractors with special wheel equipment, effective [fol. 135] December 1, 1923, put out by plaintiff about that date, as identified by the witness, offered and admitted in evidence. Defendant's Exhibit J, a circular on Weed De-Luxe tire chains, marked patented January 24, 1922, issued after that date, on the back containing "patented June 3, 1918; January 24, 1922; other patents pending," as identified by the witness, marked for identification. Tire chains of appropriate size will fit on the tires of automobiles, trucks and tractors. I know of no tractors that Plaintiff's Exhibit 1, the 30 x 3½ chain will fit. I know of no tractors that Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 will fit. The size of the chain in Plaintiff's Exhibit 2, is not the same size chain as the chain in Plaintiff's Exhibit 11. The chain shown in Plaintiff's Exhibit 11 is heavier than the chain in Plaintiff's Exhibit 1. That applies to Plaintiff's Exhibits 10, 9, 8, 7, 6, 5 and 4 being heavier than Exhibit 1. I should say in each case larger as to width and larger as to circumference with respect to Exhibits 4 to 11 as well as to size and gauge of wire. Exhibits 3 to 11 are heavier gauge wire than Exhibit 2. Plaintiff's Exhibits 4 to 11 are larger as to gauge of wire, width and length than Plaintiff's Exhibit 3. Exhibit 5 is heavier than Exhibit 4. Exhibit 6 is slightly heavier gauge than Exhibit 5 and I would say the diameter of the wire in Exhibits 6 and 7 is about the same. The chain is longer in width and circumference in Exhibit 6 as against Exhibit 7. Exhibit 8 has a larger gauge wire than Exhibit 7 and the width and length is longer in 8 than 7. Exhibit 9 is heavier gauge wire than Exhibit 8. The gauge of wire in Exhibits 9 and 10 are [fol. 136] about the same. The circumference is about the same and the width of Exhibit 10 is longer than Exhibit 9. Exhibit 11 is longer in width than 10, otherwise about the same. I know of no automobile that a 40 x 14 Single Solid

or a 40 x 7 dual solid will fit. I believe a Mack truck is made with that size tire. I know of no make of truck Plaintiff's Exhibits 3, 4, 5, 6, 7, 8, 9, 10 and 11 will fit. With respect to Exhibits 2 and 3, they did not have balloon tires during the taxable periods. Plaintiff's Exhibit 7, the 36 x 6 dual pneumatic is longer than Plaintiff's Exhibit 5, a 36 x 6 single pneumatic, that is 7 is longer in the cross chain, shorter in circumference and is heavier gauge wire than Exhibit 5. From 1905 to a later date those chains were made under the Weed Patent.

Q. I hand you Defendant's Exhibits A, B, C, D and E and ask you to pick out the Weed Patent.

Q. Have you picked out the Weed Patent?

A. I have.

Q. Is that the patent under which you assembled chains during that period?

Mr. Long: We object to that as being immaterial unless it is confined to the taxable period.

Q. I hand you what has been marked Defendant's Exhibit A for identification and ask you to state if that exhibit, marked for identification, covers the Weed patent?

Mr. Long: Now, we object to that because—

[fol. 137] Q. Let me finish—Covering the chains which you assembled with your own hands when you first began to work for the Weed Tire Chain Company.

The Court: How is that material?

Mr. McMahon: It is coming down the line.

Mr. Long: We object to it for the same reasons given before. It is not proper cross examination and is immaterial, incompetent and irrelevant to any of the issues in this case, covering chains manufactured and sold during the taxable period.

Mr. Long: On examination in chief I didn't ask you what the patent was.

The Court: I will sustain the objection to the pending question.

Mr. McMahon: Note an exception.

Weed Chains are named after Harry D. Weed. Harry D. Weed has nothing to do with the manufacturing and selling of Exhibits 1 to 11, inclusive. He is still alive and

very healthy. He is not in the Court room. Plaintiff's Exhibits 1 to 11 are similar to chains manufactured and sold during the taxable period on which tax was paid. There is no difference in construction, except the possible change in weight of both the side chains and cross chains, that is thickness of gauge of the side and cross chains. It is just possible we increased the width of the cross chain or the side chain.

Q. I believe, Mr. Morris, you told us of the difference existing in the construction of Exhibits 1 to 11 between the [fol. 138] taxable period and the period in which those chains were made, did you not?

A. I think I did.

Q. Were the differences covering the change in construction covered by patents covering an improvement in the art of manufacture as compared to the chains which you manufactured during the taxable periods?

Mr. Long: We object to that as being immaterial, incompetent and irrelevant and having no relation to the issues involved in this case as well as not being proper cross examination.

The Court: Sustained.

Mr. McMahon: Note an exception.

Part of the chain is brassplated and part of it galvanized as an anti-rust finish, to keep it from rusting. Both keep it from rusting. The difference in construction of the chains covered by Exhibits 1 to 11, inclusive, and the chains manufactured under Defendant's Exhibit B is that the construction shown in B, the Parsons patent, was of a diagonal type as against the ladder type construction that we manufactured during the taxable period. In Defendant's Exhibit B, the cross chain runs diagonally across the periphery of the tire, while in the chains covered by Plaintiff's Exhibits 1 to 11 the cross chains run directly across the periphery of the tire, that is straight across. Defendant's Exhibit B shows what looks to be a cable member, but a side chain was used on this construction just the same as on that. The same weight and size of chain was used on a compar- [fol. 139] able size. Plaintiff's Exhibits 1 to 11, inclusive, are not exactly of the same construction as the chains which I manufactured under Exhibit B. I described the difference in my answer. There is practically no difference be-

tween the chains we constructed from July 1922 to June 1924, as to construction, with the exception of the weight of the cross member chain and side member. We never used cable on it, I believe we became licensed under this patent in the latter part of 1905 or early part of 1906 and we purchased the patent outright about 1914 or 1915.

Redirect examination.

By Mr. Long:

On cross examination I testified I did not know the name of a truck or tractor that used these numbers of chains. As I understood the question it meant the name or style of the truck or tractor or the size of the chain. My answers were to that point in each case. I did not mean to testify these numbers were not used on different makes of trucks and different makes of tractors.

F. R. Baker, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Day:

I am purchasing agent for the American LaFrance & Foamite Corporation, Elmira, N. Y. I have been connected with that corporation since 1912. During July, 1922 to June, 1924, inclusive, I was in charge of the follow-[fol. 140] up division under the supervision of the purchasing agent. The product of the corporation is fire apparatus and all other types of fire fighting equipment. They do business throughout the United States, Canada and some foreign countries. The corporation during the taxable periods, made pumping cars, lighter wagons known as combination cars, water towers, tractors and equipment in general to be placed on any type of vehicles. A pumping car is a fire car equipped with a water pump to pump water from hydrants into the fire hose. These various items of equipment during the taxable period were generally mounted on automobile chassis. We made our own chassis, with solid and pneumatic tires. We also made fire equipment during that period which was sold to the trade for mounting on

automobile chasses generally. We mounted some on chassis purchased from outside manufacturers. Our largest at that time was Fords, although we have built equipment for other types of passenger cars and trucks. That applies to what we mounted and what we sold for mounting. Plaintiff's Exhibit 12—Catalogue of American La France & Foamite Corporation, No. 20, as identified by the witness was offered and admitted in evidence. When specified by the purchaser our various items of fire equipment, when sold, were equipped with Weed Tire Chains. There were a considerable number of such specifications. During the taxable period our corporation purchased American Chain Company tire chains from that company for the purpose of equipping these items of fire apparatus. At that time we purchased chains for the standard type 17 [fol. 141] four-wheeled tractors described on Page 22 of Exhibit 12. Tire chains of the type manufactured by plaintiff in this case were generally used on fire apparatus throughout the country. There were about fifty manufacturers of fire apparatus in the United States during July 1922 to June 1924, inclusive, who were manufacturing various kinds of fire apparatus, including motor driven fire apparatus similar to ours. During the taxable periods, we purchased tire chains to fit 38 x 7 single pneumatics, 40 x 8 single pneumatics, 33 x 5 single pneumatics, 32 x 4½ single pneumatics, 30 x 8 single pneumatics, 35 x 5 single pneumatics, 36 x 6 single pneumatics, 36 x 5 single solids, 36 x 5 dual solids, 36 x 4 single solids, 36 x 4 dual solids, 38 x 4 single solids, 38 x 4 dual solids, 40 x 5 single solids, 40 x 7 single solids, 36 x 8 single solids, 36 x 3½ dual solids, 46 x 7 single solids, 36 x 8 single solids, 36 x 4½ dual solids, 38 x 8 single solids, 40 x 6 single solids, 40 x 8 single solids, 36 x 9 single solids, 35 x 4 dual solids, 38 x 7 single solids, 38 x 10 single solids, 36 x 3½ dual solids, 38 x 3½ dual solids. These sizes cover chains for equipment mounted on our own chassis and on the chasses of other automobiles. It includes both classes. These tire chains were marked by me and went out as part of the equipment of this fire apparatus only when specified by the customers. The number of items of fire apparatus on which tire chains were specified was a small proportion of the total number of items of apparatus sold by the company.

[fol. 142] Cross-examination.

By Mr. McMahon:

The four-wheeled tractor shown on page 22 of Exhibit 12 is actually mounted on an automobile chassis that we manufactured for that purpose. During the taxable period, my travels were rather limited. I was not out looking for tire chains on fire apparatus. I know they were equipped with tire chains, but I don't know as I can truthfully say that I have seen very many sets of tire chains on fire apparatus throughout the country. I saw them in Elmira. I am not acquainted with what is inside the bags of Plaintiff's Exhibits 1 to 11 and could not answer your question as to whether one of them contains a 38 x 7 single pneumatic pair of chains, except from the notations on the bags as to sizes. The chains we purchased from the American Chain Company during the taxable periods had notations as to size on the outside of the bags. Plaintiff's Exhibit 6 is similar to the bags I saw enclosing chains during the taxable periods and contains much the same printed matter. The 38 x 7 single pneumatic tire might be on any type apparatus except the rear wheels of the four-wheeled tractor, the tires and wheels are changed in a great many cases on fire cars, depending upon the customer's specifications. I cannot answer the question as to whether we ordinarily shipped a pair of 38 x 7 chains with our standard type No. 38 triple combination pumping chemical and hose car. We did not make passenger car vehicles for fire chiefs. I saw one in Elmira during the taxable period. I cannot answer how many pieces of fire apparatus of our make or any other make I saw in Elmira during the taxable period. I have [fol. 143] seen chains actually in use on fire apparatus during the taxable period at the factory on experimental cars. They were placed on the finished product before shipping, removed and returned to the bag. I saw those chains actually in use on our finished product after it left the factory at Elmira Fire Department, that is one set of chains, but I cannot tell you the size. Plaintiff's Exhibit 12 does not contain a list or pictures of cars or equipment requiring all of the different sizes of tire chains which I testified we purchased from the American Chain Company during the taxable periods.

Mr. McMahon: I move to strike out the testimony of this witness covering the use of tire chains throughout the country.

The Court: Denied.

Mr. McMahon: Note an exception.

The Court: Exception noted.

Redirect examination.

By Mr. Day:

Plaintiff's Exhibit 12 does not contain the list or pictures of all sizes of tires upon which these chains were used that my testimony showed we purchased. Wheels on fire apparatus are of a special character in a good many cases and the customers demand what they think best. For instance in that Catalogue you will find pictures of vehicles showing pneumatic tires upon which the specifications are written that call for solid tires.

[fol. 144] Recross-examination.

By Mr. McMahon:

With the special wheels we are called upon to provide a chain that will fit that tire. We purchased chains from the American Chain Company, which we shipped with our own apparatus and other makes of chassis with our fire equipment mounted on it. Those chasses were automobile and truck chasses. We shipped them with the completed articles as part of the original equipment. We mounted our equipment on Fords to quite an extent and used Brockways to quite an extent and further than that I won't include any more. The bags containing chains as shown by Plaintiff's Exhibits 5, 6, 8 and 9 show they contain chains of the sizes mentioned in my direct examination.

Fred B. Alger, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Long:

I am sales manager of the Braxton Motor Car Company, Middleboro, Mass. That company manufactures a motor

driven fire apparatus and did during the taxable periods. Our fire apparatus is mounted on trucks of our own manufacture in some cases and in other cases on other types of trucks, such as Fords, Stewarts, Reo's that I recall, perhaps others. During the taxable periods my company purchased chains, Weed Chains, principally from the Butts & Ordway Company of Boston, Mass., which were sold with [fol. 145] the apparatus to purchasers, upon orders of such purchasers. We did business in all six of the New England States and the States of New York and New Jersey. We equipped our apparatus principally with sizes 36 x 6 single pneumatics, 38 x 7 single pneumatics and 40 x 8 single pneumatics. These sizes fit the tires of the trucks that were part of our own manufacture. Additional sizes were for the other trucks I mentioned, but I could not give those sizes. I could not swear to having seen chains in use on fire apparatus during the taxable period, but they were purchased and sold by our company during that period.

Cross-examination.

By Mr. McMahon:

I distinguished the sizes of chains by referring to the files in which I find the actual bills from the Butts & Ordway Company. I could not swear to seeing those chains come into our institution during the taxable period.

Henry H. Heitmann, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was Chief of the Waterbury, Connecticut, Fire Department. I have been connected with that department for 39 years. In certain parts of the year we used Weed chains, not always, [fol. 146] during that taxable period. During that period we had different types of equipment, 19 pieces in all, such as hook and ladder, trucks, pumping engines, triple combination hose and pump, hose wagon, chemical engines,

not all of them of the American La France make. Two Locomobiles were made in Bridgeport, and one Robbins pumping engine was made in St. Louis. We used Weed chains on all in the taxable period. On the Locomobile were single pneumatic tires 38 x 6 and on the Robbins 38 x 6 in the rear and 35 x 5 front. We had duel tires 37-inch and two dual straight 38 inch. One machine there used 38 x 8 rear and 38 x 4 in front. The Dayton Ellis used 38 x 4 duals, two on the rear and on each wheel. The triple combination pumping chemical and hose, solid tires, 38 x 4 dual rear and 38 x 4 front. The triple combination used the same sizes. The Dayton Ellis used 38 x 4 dual rear and 38 x 4 front. The other pieces used practically all the same sizes. The tires are the same size. During snow and rainy weather we put them on. During snow we kept them on continually. Sometimes we used chains on all four wheels, that is during heavy snow. Plaintiff's Exhibit 13, photostat of fire equipment superimposed on a Locomobile automobile chassis, purchased in 1908 for Waterbury Fire Department, as identified by witness, offered and admitted in evidence.

Cross-examination.

By Mr. McMahon:

I have given the sizes 38 x 8, 38 x 6, 38 x 5 and 38 x 4 single and some dual solids. We also had a Cadillac and [fol. 147] Buick passenger cars during that period on which I think we used 35 x 4½, I am not sure. The pumpers and hook and ladder wagons, chemical wagons are all mounted on a truck chassis. The chains used on the fire apparatus was heavier than the chains used on the Cadillac and Buick.

Redirect examination.

By Mr. Swindler:

We purchased the Weed chains used on our equipment during the taxable period from most any hardware store. They were purchased according to the size of the tire of the vehicles on which used. I told them the size and they furnished the chain for it. The difference I spoke of in chains for automobiles and apparatus was in the size of

the chains and heavier chain was used. The difference was due to both size and weight. Exhibit 13 shows a chassis of standard size, it was standard equipment at that time. The Locomobile people at that time, I believe, made all chain driven chassis. (Recalled.) The department owned and operated a fire chief's car on which we used Weed Chains. We had a Locomobile fire chief's car in 1912 or 1913 on which we used Weed Chains. Those tires were not of the same size as is represented in Exhibit 13, it wasn't quite as large as that. We used Weed Chains during the taxable periods on the fire chief's car as well as the apparatus.

Q. Did these chains function as well on both vehicles or on one vehicle as on the other?

Mr. McMahon: The Government interposes an objection [fol. 148] to the question for the reason it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

Mr. Swindler: Your Honor, this witness is qualified to testify to the use of these chains both in an automobile, as alleged by the Government, and upon the fire apparatus.

The Court: I think he is. I will rule that way.

Mr. McMahon: The defendant, in this connection wishes to call the Court's attention to the fact that he is asking the witness not if they used it but if it functioned just as well.

The Court: This witness is qualified to answer. He is chief of the fire department and if he can't testify as to the operation of the apparatus under which he has charge I don't know who can.

Mr. McMahon: Do I understand that the question goes only to the matter of operation of the apparatus or do I understand that the question of function there applies to the question of design or the question of adaptability.

Mr. Swindler: The question speaks for itself.

The Court: I don't know what counsel understands by the question—if he will explain it to the Court.

[fol. 149] (Question read by reporter.)

The Court: I will overrule the objection.

Mr. McMahon: Note an exception.

A. They functioned very good on both touring cars and the apparatus.

Q. Did they function equally as well?

A. Equally as well.

Mr. McMahon: The Government objects to the answer because it has not had an opportunity to interpose an objection. I move to strike the answer of the witness for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion of the witness, assumes facts to be true not shown by the evidence and usurps the power of the jury.

The Court: Motion denied.

Mr. McMahon: Note an exception to the ruling of the Court.

Recross-examination.

By Mr. McMahon:

I didn't mention the word "function" I don't believe. What I meant was that they functioned all right or worked all right. That is as far as I can say—adapted for the car. That is about all—functioned that way. I mean by that the chains were used and they prevented the car from slipping or skidding. I do not mean anything further than that.

[fol. 150] Henry A. Steeves, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During June, 1922 to July, 1924, I was treasurer of the Somerville Sales and Service Authorized Ford Dealers, Somerville, Mass., engaged in the sale of automobiles, cars, trucks and tractors. During that period we sold Weed Chains. We sold 40 x 5 single solids and 40 x 5 dual solids. That is a tractor tire, taken off a tractor in my presence. It is a 40 x 5 Firestone Cushion tire. Part of that is one of the original chains that was sold by us to fit that size tire in 1922. The side chains are the original side chains that we sold. The cross chains have been worn out and replaced many times. Those are not the original cross

chains. On this particular tractor this chain was sold to fit, they have since taken off the tire and replaced it with a seven inch tire instead of a five, consequently lengthened the cross links. Plaintiff's Exhibit 14—Weed Tire Chain 40 x 5 for Tractor Tire. Plaintiff's Exhibit 15, 40 x 5 Tractor Tire. Both offered and received in evidence, as identified by the witness.

Q. Mr. Steeves, can you state whether or not Weed Chains are generally and commonly used on tractors in the vicinity of Somerville, Mass.

Mr. McMahon: The Government interposes an objection to that question because it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes [fol. 151] facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent, not the best evidence and usurps the power of the jury.

Mr. Swindler: Your Honor, we have a witness here that is in the business of selling these. It must be part of his business to ascertain the demands of his trade—his customers. He testified he has sold these chains. He must be qualified, I think, to testify to the general common use of these chains for tractors.

The Court: I think he may answer. Objection overruled.

Mr. McMahon: Note an exception.

A. Yes.

Cross-examination.

By Mr. McMahon:

Q. I will ask you to examine Plaintiff's Exhibits 1 to 11 and state whether or not those exhibits contain a chain of the same size, width and length as the chain which you have identified as Plaintiff's Exhibit 14.

A. You mean you want me to measure them? I have no way of knowing. I don't know what the length is of any one of the chains.

Q. No, will you determine for us what it is?

A. That what is—these here—any of them?

Q. Yes, see if there is any in there like that one.

Mr. Swindler: Your Honor, owing to the breadth of that [fol. 152] question the witness can't comply with the request of counsel's question.

The Court: Sustained.

Q. Do your duties take you about the country in your official capacity in connection with your occupation with this auto concern?

A. No, sir.

Mr. Swindler: I object to that as improper cross examination.

The Court: Do you press your objection?

Mr. Swindler: I do.

The Court: It has been answered. Do you move to strike it out?

Mr. Swindler: I move to strike the answer of the witness as an answer to improper cross examination.

The Court: Motion granted.

Mr. McMahon: Note an exception.

I have never seen Plaintiff's Exhibit 14, in actual use on that particular tire identified as Plaintiff's Exhibit 15. During the taxable period that particular chain was sold by us as 40 x 5 single solid chains. That is all its description. We purchased it from Ashton De Vere, Inc., Plaintiff's Exhibit 14, that particular chain is referred to as a Truck Chain, 40 x 5.

R. L. Morton, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Long:

During July, 1922 to June, 1924, inclusive, I was Chief [fol. 153] Engineer for the Fox Rotary Snow Broom Company, Philadelphia, Pa., who manufactured and sold snow brooms. Those brooms consisted of a steel superstructure on which was mounted a motor with a reducing gear and a rotary broom, disposed at a 45 degree angle on lifting arms so that it could be raised and lowered, and mounted on a five-ton motor truck. We made the snow broom and in some cases made the truck. In other cases we supplied trucks of other manufacture that were specified by the purchasers of snow brooms. The other trucks were of White, Pierce Arrow, Mack, Brockway, Kelly-Springfield and the Hurlburt was of our own make. The tires on the

trucks we made were 36 x 12 and 40 x 12. They were the same size as the other trucks mentioned. We did business in Michigan, Illinois, Pennsylvania, New Jersey and New York. Exhibit 16, Fox Rotary Snow Broom Print, as identified by witness offered and admitted in evidence. That machine was used in New York City. It is mounted on a 5 ton White chassis. Our snow machine was superimposed on that five-ton White chassis. We purchased Weed Chains for use on our various machines during the taxable period, that is on the tires of the trucks of our various machines. That is a circular of the Fox Company, showing its product mounted on different makes of trucks and chasses that were sold by us during the taxable period. Weed Chains were a part of their specifications. Plaintiff's Exhibit 17, Catalogue of Fox Rotary Snow Brooms mounted on different makes of trucks and chasses, as identified by the witness, offered and admitted in evidence. Page 5 of [fol. 154] Exhibit 17 shows a Fox Snow Broom mounted on a five-ton Mack Truck. It is a four-wheel drive truck. Those various machines referred to in the Exhibit were sold during the taxable period by our company and Weed Chains were used on each and all of them. That is a circular of the Fox Rotary Snow Broom devoted to municipalities, street railways issued in 1923. Exhibit 18, as identified by the witness, offered and admitted in evidence. Page 3 of Plaintiff's Exhibit 18, shows a Fox Rotary Snow Broom mounted on a five-ton Hurlburt Motor Truck of our own manufacture. The middle picture shows a Fox Rotary Snow Broom mounted on a five-ton Mack Truck. The second page shows a section of the New York fleet of Fox Rotary Sweepers. Page one shows a Fox Rotary Snow Broom in the Borough of Queens, New York City, mounted on a Pierce-Arrow truck. The fleet are mounted on Pierce Arrow trucks. All of those machines were manufactured and sold by our company. Weed Chains were used on such machines during the taxable period. The sizes of chains used on those trucks were 36 x 12 solid tires, either dual or single and 40 x 12. During the taxable period I have attached Weed Chains to these motor plows and am well acquainted with their use on this kind of apparatus. I have attached Weed Chains to automobiles and trucks. The Weed Chains used on this equipment worked well, were satisfactory and I had no complaint to make. We bought the chains from a jobber of the American Chain Company

located in Harrisburg, Pa. We bought them to fit the cer-
[fol. 155] tain size tires that were on the truck at the particular time, namely, 36 x 12 and 40 x 12.

Cross-examination.

By Mr. McMahon:

I actually saw chains probably on all of the machines described in Exhibits 16, 17, and 18 several times. I mean for you to understand that I actually saw Weed Chains used on each of the machines sold by our company during the taxable periods with my own eyes. I saw them in New York last winter, the machines are still in existence.

I saw the chains used during the winters of 1922 and 1923 in all of the states. In New York I saw them in New York City and Buffalo, all over the city, not all over at the same time. It is just possible that chains might have been used quite often when I didn't see them. It is possible that chains may have been used that I didn't know anything about. I saw them in use at intervals, not every day, just when the machines were in operation. They cannot operate without them. The chasses of the machines in Plaintiff's Exhibits 16, 17 and 18 are standard Truck Chasses and the wheels are standard truck chassis wheels. We included a pair of chains as original equipment on each of the machines we sold during the taxable period. That was our custom.

Redirect examination.

By Mr. Long:

Our company made the Hurlburt Truck, super-imposed the snow sweeper on top of it and sold it to cities for use in
[fol. 156] snow removal from the streets, also the other trucks used had our snow broom superimposed on them. They were used for removing snow from roads and highways in some cases. They could be utilized for that purpose where the snow was not too deep. The machines were not used for transportation of persons or property, they were used for removing snow from streets, highways and roads. With an ordinary truck chassis, to superimpose our broom, it simply meant the location of three cross members in the frame of the sweeping broom, which were lo-

cated across the frame of the motor truck, two of them back of the grip and one in front of the radiator. There were two motors used, the motor in the truck did the propelling and the auxiliary motor provided in the broom structure turned the broom, which performed the mechanical function. A motor truck chassis consists of a motor-engine-transmission, front and rear axles, four wheels, frame, springs, dash, hood, radiator and the necessary spring bolts and spring shackles and step irons, mud guards and so forth to assemble a complete motor truck. The chassis does not carry a bed for freight. The truck complete does. We removed the bed and we just bought the chassis without the bed.

MAURICE WALTER, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Long:

I am Chief Engineer of the Walter Motor Truck Company, Atlantic Beach, Long Island, who manufacture Wa- [fol. 157] ter Snow Fighters. It is not a broom, but a snow fighter. It is a machine to push snow. They have been manufacturing it since 1921. Prior to that time they manufactured motor trucks and tractor trucks for hauling and carrying purposes. The Walter Snow Fighter in appearance resembles a motor truck using a conventional type wheels, but the design and structure of the chassis is such that it drives on four wheels with a positive system of driving. It has a powerful motor, a special range of transmission ratios to give maximum speed and traction for pushing under all conditions. In other words it is built for its pushing ability rather than carrying ability. The distinct snow fighter model was not originally used for carrying passengers or freight. During the taxable period we did business in approximately five or six states, including Canada. There was one machine sent to Canada and we did business in New York, New Jersey, Michigan, Ohio and Pennsylvania and other states at the time. During the taxable period we purchased Weed Chains and used them in demonstrating the Snow Fighter. It was not our policy to sell the machines with Weed Chains. I don't recall any

request to equip the machines with them. We would advise the purchasers to acquire the Weed Type of chain. It was necessary to equip the machines with chains to use them in all but the very lightest snows, as traction on all four wheels was necessary in order to use the unit effectively. We manufactured the complete Snow Fighter. We did not use standard chasses because they would not de-
[fol. 158] velop the proper pushing power for the conditions of service. They did not have the proper horsepower or gear reduction. Exhibit 19-A is a photograph of the first snow fighter taken in March, 1921. During the taxable periods we made machines similar to that. Exhibit 19-B is another view of the Walter Snow Fighter demonstrated in 1921. It has tire chains, but not the Weed type. Exhibit 19-C is another view of the same snow fighter. It has tire chains but not Weed. Exhibit 19-D is one of a similar type machines delivered to the Fifth Avenue Coach Company several months later. They regularly used tire chains but I am not prepared to say if they were of Weed Manufacture or not. Exhibit 19-E shows Walter Snow Fighters working in New York State, equipped with Weed Chains on both rear wheels. That is in the country near Cortlandt, New York. Exhibit 19-F shows two Walter Snow Fighters purchased by Fifth Avenue Coach Company with Weed tire chains on front and rear. Exhibit 19-G is a Walter Snow Fighter sold to the Toronto Bus Commission in 1921. I don't know if those are Weed Chains. Exhibit 19-H is a Walter Snow Fighter with motor plow, sold to Rensselaer County, New York, equipped with Weed Chains. Exhibit 19-I is another view of the Walter Snow Fighter for the Fifth Avenue Coach Company, New York City. Those are Weed Chains. Plaintiff's Exhibit 19, consisting of photographs described as 19-A to 19-I, inclusive, as identified by the witness, was offered to merely show the machine and admitted in evidence, I have used Weed Chains on automobiles. On the
[fol. 159] Snow Fighters with solid tires they generally used 40 x 7 size, sometimes the 40 x 6 dual and with the pneumatic's size 40 x 8, all Weed Chains. Used them on all four wheels. At that time we were buying from the Prudden Hardware Company or other hardware jobbers of New York, but they delivered to Long Island. The front tires were 40 x 7 solids, the rear tires were 40 x 6 duals, some machines had the same front and rear tires.

Cross-examination.

By Mr. McMahon:

We did not sell chains as part of the original equipment of Weed Manufacture. In some cases these chains wore out rather rapidly from the point of view of time, not mileage. They were not used every day during the taxable periods, but about 90 per cent of the time used for snow service the chains would be on. The snow service period depends—The Fifth Avenue Coach Company used the machines day and night for several months. We first made the motor truck snow plow in 1921. The automobile was in existence at that time. I have seen chains on automobiles at that time and prior to that time. The chains we purchased for demonstration purposes usually had a mysterious series of numbers. We looked at the bag and measured them and if we knew they would fit a certain size tire they would be all right. As I recall, the bags always had the size like 40 x 8 or 40 x 7 and if solid tires were specified, whether for single or dual. I suppose they also had on them American Chain Company, Weed Type. Sometimes [fol. 160] they had heavy duty on them or something like that. Plaintiff's Exhibit 6 is a similar bag to those we purchased during the taxable periods. I cannot tell specifically if the wording was Weed Truck Chains, Weed traction chains, or whatever it might be.

Redirect examination.

By Mr. Long:

Q. Were these Weed chains used on your machines?

Mr. McMahon: The defendant objects to the question because it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: The same ruling, you may have it.

Mr. McMahon: Note an exception.

The Court: Exception noted.

A. They were generally used on Walter Snow Fighters. When we bought the chains, we would order a specific

size chain, such as 40 x 7 single or 40 x 6 dual, whatever size we required without specifying anything else. I have used chains on my automobile and operated the Snow Fighter with Weed chains on the tires.

Q. Did the chains on the Snow Fighter that you operated perform the identical function as the chains on your automobile?

[fol. 161] Mr. McMahon: The defendant objects to the question because it calls for the conclusion of the witness, the witness is not qualified to answer. It assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: Admitted.

Mr. McMahon: Note our exception.

A. They did.

These chains that we bought fitted the tire and were satisfactory.

Recross-examination.

By Mr. McMahon:

By function I mean the working of an article, in this case of chains, the function of the chain is to give traction between the rubber and road surface, and my answer is limited to traction between the rubber and road surface.

Redirect examination.

By Mr. Long.

There was one motor on the Snow Fighter. That motor performed the function of turning the wheels to develop the pushing of the plow.

Recross-examination.

By Mr. McMahon:

The motor used in that machine was more powerful than the standard truck motor. It was of one hundred horsepower.

[fol. 162] Redirect examination.

By Mr. Long:

The tires on the Snow Fighter were of the Standard Commercial size of truck tires. The one difference as compared to ordinary truck practice was that big tires in diameter and cross section were used on the front wheels as well as on the rear wheels.

Recross-examination.

By Mr. McMahon:

The tires used on the Snow Fighter were standard truck tires, solid and later pneumatic. The first pneumatic I believe was in 1924 in June or July. We did not have pneumatic tires in use during the taxable periods on our trucks.

William A. Palmer, a witness, whose deposition was taken on behalf of plaintiff, at Minneapolis, Minnesota, on the 17th day of August, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

I am general foreman of maintenance, District 9, of the State of Minnesota, for the State Highway Commission of Minnesota, with headquarters at Hopkins, Minnesota. I started with the State Highway Commission in August 1923 as general foreman and continued in that position to date. During August 1923 to June, 1924, inclusive, we used tire chains, "Weed Chains" made by the American [fol. 163] Chain Company for tractors and trucks and some cars, but our car chains were nothing to speak of. We obtained these chains from the Highway Supply Shop, at Midway, State Fair Grounds. We just issued orders for them and they were delivered to us by our pick-up man from the St. Paul shop. We used the chains in the winter time on snow, they were put on—in that period, most of our trucks ran pretty strong to solid tires; outside of Quad trucks, they would use pneumatic tires with pneumatic

tire chains, but the other chains were used on tractors or trucks that were in the work—put on the tires. We ordered the chains by sizes. In ordering I would order the 40 x 6 or the 40 x 7 dual and that could be used on possibly the Pierce-Arrow trucks, Liberty trucks and also on Fordson tractors and No. 1020 tractors, the International. We used them. We made no distinction as to whether they were to be used on trucks or tractors, just used them as we saw fit. We very seldom used chains except in snow work and very little snow work was done without chains. That is removing snow from highways, after construction of the highway, when it is blocked with snow. From August 1923, to June, 1924, inclusive, I would not want to make a positive statement as to the time the roads were blocked with snow. We usually figure on snow in November and through March, three or four months. We used chains during that time on tractors. I would have to check our records to know how much of that equipment we used each day of the month, the amount of snow would depend entirely on the [fol. 164] storms. From November until March is our snow period and we might work ten straight days and we might not work only two days, it would depend on the snow fall. There was considerable snow during those years. These tire chains were interchangeable for use on automobiles and trucks or tractors, if the proper sizes were used and the same condition of labor, without any change in the chains.

Cross-examination.

Read by Mr. McMahon:

During the taxable periods we were using four tractors in my district, 20 trucks and four passenger cars of the Commission's. We pull road equipment with trucks as well as tractors in the snow. We used most chains on tractors during that period because there were only about four of those trucks that we used on snow work. We did not use chains on trucks in mud as a custom, just occasionally we do. We had about an even break between trucks and tractors, except our tractors would run steadier and go through a set of chains in twenty-four hours. Heft of the chains doesn't seem to make any difference, they just simply wear down on concrete roads, hard surfaced

roads and gravel. The 40 x 6 or 40 x 7, duals, would be used on a tractor or a truck, solid tires both on trucks and tractors. We could not use them on the passenger cars. The chains came to us in sacks, I expect the sacks are marked, it states the size on the sacks and whether they were duals. I do not think the heavy chains are marked themselves. The chains were picked up on my order and [fol. 165] placed in stock. American Chain Company chains were purchased by the Highway Department at St. Paul. We just ordered so many chains of a certain size and they bought them where they pleased. Occasionally, if we were short, we would pick them up locally in Minneapolis.

Redirect examination.

Read by Mr. Long:

I was pretty sure Weed Chains were made by the American Chain Company. My department is No. 9. There are 16 departments or districts in the State of Minnesota. I have been in other departments as an observer. The work carried on in the other departments was similar to mine. The use of chains was similar in other departments to what it was in No. 9.

Recross-examination.

Read by Mr. McMahon:

My answers are confined purely to my knowledge of the state of conditions in the State of Minnesota.

GEORGE SCHLISSEL, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During the period July 1922 to June, 1924, inclusive, I was chief mechanic in the volunteer fire department, West Shore Fire Department, West Haven, Connecticut. During [fol. 166] that period we had a Ford Howe Pumper which we purchased from the Ford Howe Fire Department Equip-

ment Company of Fort Anderson, Indiana. That equipment was superimposed on a Ford one-ton truck. The size of the tires were 30 x 3½ in front and 32 x 4½ in the rear. We used Weed Chains on all four wheels, 30 x 3½ and 32 x 4½, during that period. The truck came to us fully equipped as fire apparatus. I, at no time used the chains from the rear wheels of this truck on an automobile. After we retired the fire engine, I used chains from the front wheels on my Ford Sedan, having 30 x 3½ wheels. They worked as well on my Ford as on the fire apparatus. They fit as well on one as the other. I do not know where the chains used on the fire apparatus were purchased. I saw Weed Chains used on the hook and ladder in the center of town. They used a single link chain on a solid tire. That equipment is located on Second Avenue near the center of West Haven. That was a single link chain fastened on a solid wheel. It was a Weed Chain. Plaintiff's Exhibit 20, photograph of Ford Howe Pumper, West Shore Fire Department, as identified by witness, offered and admitted in evidence. We used chains on that equipment from the fall of snow until the dirt roads dried out in the spring.

Cross-examination.

By Mr. McMahon:

The cross links on Plaintiff's Exhibit 1 are connected by a side link, while single link chains are nothing but the cross links and are fastened on hooks and bolts inside the [fol. 167] flange of the wheels. They can be demounted. When the wheel turns the single link chain does not slide around the tire, it is permanently fastened. The single link chain is from fourteen to sixteen inches long. They were probably using four chains on one wheel.

Frank M. Hutchinson, a witness, whose deposition was taken on behalf of plaintiff, at Minneapolis, Minnesota, on the 17th day of August, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

I am Purchasing Agent for the Motor Power Equipment Company, at Ford Road & River Boulevard, St. Paul, Min-

nesota. As such I purchased tire chains from jobbers in St. Poul and Minneapolis to use on rubber-tired wheels of Fordson tractors. The business of my company was equipment to go with Fordson Tractors If we needed chains for our rubber-tired tractor wheels, we called up various jobbers, such as Minneapolis Iron Store or Nicols, Dean & Gregg, who were jobbers for Weed Chains and asked for chains for tractors They said they carried no chains for tractors, they carried truck chains; if you have got the size they could supply us with those, so we measured the wheels and ordered four or five sizes of truck chains which we used on these tractors Those sizes were 40 x 5 single; 40 x 5 dual; 40 x 7 single and 40 x 10 single. They were the chains listed as truck chains and we bought them for use on rubber [fol. 168] tired tractors, Fordson tractors. We carried on that business in that way from the fall of 1924 until the last part of 1927 or the first part of 1928. I could not be sure when Ford discontinued supplying that tractor. We sold equipment in Minnesota, North and South Dakota and twenty-four counties in Western Wisconsin. Chains commonly used on trucks could be used on tractors without any substantial change, we used the same chains on both trucks and tractors interchangeably.

Cross-examination.

Read by Mr. McMahon:

The 40 x 7 single chain I spoke of will not fit an automobile, none of them would fit Ford trucks, they would fit larger trucks, but I cannot tell you the makes of those. We used the 40 x 5 duals on Coleman trucks, four-wheel drive trucks, which is the only truck we used ourselves. We sold these chains to others who had larger trucks, but we actually delivered them only on that make of truck. We demonstrated Coleman trucks, we used chains to demonstrate them. I actually saw the others in use on other trucks; they were truck chains; they were not tractor chains, that is what we bought for the tractors. From the fall of 1924 until 1928, we used Weed Chains just on Fordson tractors, afterwards we used them on the Allis-Chalmers tractors, that is after 1928 we discontinued the Fordson and sold Allis-Chalmers tractors. The Coleman truck is made at Littleton, Colorado, a suburb of Denver.

It has a good distribution. It is sold for highway main-
[fol. 169] tenance work; it is a four-wheel drive truck. The army had them—a lot of them during the war. It is not sold in general use though. There were no chains available when we were in this business for tractors; that is why we had to order the truck chains. That is why we were using straight truck chains. We had to measure up our tractors and order a size that would fit out of the truck chain models available. In other words these distributors and jobbers did not have anything they listed as a tractor chain at that time and we acquired these chains that were put out for trucks and put them on our tractors. We paid no attention to the duty requirements of our tractors as compared to the truck, they worked satisfactorily on the tractors.

Ebbe Carlson, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was Secretary and Chauffeur for the Fairfield Volunteer Fire Department, Fairfield, Conn. During that period we had two Locomobiles—chemical and hose wagon—one Ford hose and pump. The size of the tires on the Locomobile equipment were 35 x 5 and on the Ford equipment 30 x 3½ front and 32 x 4½ in the rear. That vehicle was a Ford truck chassis. It was purchased from Woodhouse in New York City. It was made by the Watrous Pump Company, at
[fol. 170] least that was the name on it. It was purchased new and came to us fully equipped. We used Weed chains on all pieces of fire apparatus during that period. We bought some of the chains used on the Locomobile and some were given to us. We usually went out and tried to get them as there was very little money to buy things with, being a volunteer fire department organized about 1897 and much of the equipment donated. A pair of chains that was used on one of the Locomobiles was donated by a party who had been using them on a Cadillac limousine.

Q. Did these chains work as well on the fire vehicles as they did on the Locomobile?

The Court: Just a minute. It doesn't appear that he knew how they worked on the Cadillac.

Q. I withdraw the question. Did the chains fit as well on the Locomobile fire vehicle as on the Cadillac?

A. They were a perfect fit.

The Court: That is the same thing. Do you press your objection, Mr. McMahon?

Mr. McMahon: No, I don't.

Q. The question was: Did the chains fit as well on the Locomobile fire apparatus as it did on the Cadillac?

A. They were. They were a perfect fit on the Locomobile.

We made no change or alteration to make them fit. When we bought chains, we always asked for "Weed." We did not ask for a chain primarily designed for fire apparatus. Weed chains were used on all of our vehicles.

[fol. 171] Cross-examination.

By Mr. McMahon:

By fully equipped fire apparatus, I mean it came through as regular fire equipment—the pump and all attached right on it, ladders, hose and all. I don't remember if it has chains with it. I bought a pair right after, but whether there was a pair with the truck or not, I couldn't tell you.

Redirect examination.

By Mr. Swindler:

We used chains on three wheels of the Ford from the inception of bad weather until the roads dried out in the spring. I mean by that, we used chains on the two rear wheels and right hand front wheel. We used them on one front wheel when out on dirt roads to pull them out of a rut. We did not customarily use the chains on one of the front wheels. We got the same result by using them on just one front wheel.

Louis D. Christy, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was chief of the fire department, Nichols, Connecticut and we had one Model T Ford. That was mounted upon a Ford automobile chassis. The sizes of tires were 30 x 3 front and 30 x 3½ on the rear. We used Weed Chains on that Ford during that [fol. 172] period on the rear wheels only. That is a picture of the Ford T Model apparatus with the La France equipment mounted on it. It was taken in 1919. Plaintiff's Exhibit 21—Photograph of Fire Apparatus of Nichols, Conn. Fire Department as identified by witness offered and admitted in evidence. I have a wheel and tire taken from that equipment in court. That is the rear wheel taken off the Ford Chemical apparatus. The size of tire is 30 x 3½. I took that wheel off personally. I did not personally buy chains for the vehicle.

Mr. Swindler: I offer this as Plaintiff's Exhibit 22.

Mr. McMahon: The defendant objects to the offer of the Model T Ford wheel as immaterial to the issues in this case.

Mr. Swindler: Your Honor, the witness has testified to the use of this fire equipment and the use of the chains on it, and——

The Court: Do you claim that this type of fire department equipment is non-taxable?

Mr. Swindler: We do.

The Court: Under regulation or statute?

Mr. Swindler: I might say under regulation and statute.

The Court: Overrule the objection.

Mr. McMahon: Note an exception.

V

[fol. 173] Charles G. Keller, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was chief of the Stepney Fire Department Stepney, Conn. We had a

Ford automobile chassis with a chemical tank on it. We did not buy that equipment, it was given to us. The body was taken off from an old horse drawn chemical truck and mounted on the chassis. The size of tires was 30 x 3½ and we used Weed Chains on that equipment during that period. During that period I observed equipment of nearby fire departments. There was Monroe, Connecticut, where I saw a Reo Speed Wagon. I think the tires on it were 34 x 4½. I saw Easton, Connecticut, department. They had Oldsmobile equipment. The size of that tire was 35 x 5. Those are pictures of the Stepney fire truck at that time, two different groups taken from different positions. That represents the vehicle I discussed. Plaintiff's Exhibits 23 A and 23 B, photographs of Stepney, Conn. fire apparatus offered and admitted in evidence. I own a Chevrolet automobile with a 30 x 3½ tire. This is the rear tire from the rear wheel. I took it from my automobile. It is size 30 x 3½. Plaintiff's Exhibit 24, Automobile tire, marked for identification. During this period I saw Long Hill fire department's equipment. I have seen Haddertown's equipment. They had a Ford, tire sizes 30 x 3½ both front and rear. All the equipment I saw used Weed Chains. I ordered the driver to buy the tire chains at Stepney.

[fol. 174] Cross examination.

By Mr. McMahon:

The fire department equipment at Stepney was mounted on a Ford automobile chassis. The Monroe, Conn. equipment was mounted on a Reo truck chassis. The Easton, Conn. equipment was mounted on an Oldsmobile truck chassis. Haddertown equipment was mounted on a Ford automobile chassis.

Louis D. Christy, a witness recalled by plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

I have in Court the chains that were used on Plaintiff's Exhibit. That is a chain taken off the rear wheel of the

Ford Chemical at Nichols. I can't be sure if this chain or that one was on that wheel, but the wheel was taken off from that vehicle. Plaintiff's Exhibit 25, Chain from Plaintiff's Exhibit 22, as identified by witness offered and admitted in evidence. Plaintiff's Exhibit 24 withdrawn.

ROYAL B. DEAN, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was salesman for B. A. Dean & Son and Dean-Dillingham Company, two [fol. 175] correlated concerns, Auburn, New York, engaged in the business of farm products and farm implements. I sold Weed Chains during that period. I sold them for use on tractors during that period. 40 x 5 single solids and 40 x 5 dual solids and 40 x 7 single solids and 40 x 7 dual solids. It was not primarily my business to know the demand in my territory in New York for chains for tractors, but I was fairly well acquainted with it. It was the general practice to use the chains on tractors in my territory during this period. I saw chains used on fire fighting equipment during this period at Auburn, N. Y. The size of the tires on those vehicles were 36 x 4 single solids, 36 x 7 single solids, 36 x 8 single solids. I have seen Weed chains used on road graders or snow plows at Watertown, New York, Syracuse, New York and Auburn, New York.

Cross-examination.

By Mr. McMahon:

I did not sell tractors. I didn't sell all of the chains used in my trade territory during the taxable period. Various concerns sold chains of different makes. I did not deal in special chains for tractors. The size of the chains was on the bag. I designated the chains as Weed. They came to us in bags labelled similar to Plaintiff's Exhibit 6.

WILLIAM HEANEY, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, my business was selling tractors for the Martins Company, Syracuse, [fol. 176] New York. During that time I sold Weed chains for use on road graders, snow plows and tractors. The sizes sold for use on tractors, were fronts, 30 x 3½ and 30 x 3, single solids and rears 40 x 3½ single solids, 40 x 7 dual solids, 40 x 5 single solids, 40 x 10, dual solids, 40 x 8 pneumatics and 40 x 10 pneumatics. I have seen chains used on the front wheels of tractors. The sizes 30 x 3 and 30 x 3½ were the sizes used on front wheels. I saw industrial tractors using chains at the Solvay Process, Solvay, New York. Those are small tractors used around industrial plants, railroad yards and railroad station terminals for carrying baggage. The size of tire on the road grader I saw using chains was 40 x 5 dual solids. I saw it in operation in the City of Syracuse.

Cross-examination.

By Mr. McMahon:

I sold the Fordson tractor. A 40 x 10 dual chain would fit the wheel of the tractors I sold. Most of those tractors were equipped with Whitehead & Kale wheels. The Fordson tractors I sold took 30 x 3, 30 x 3½ for front wheels and 40 x 10 duals and 40 x 10 singles for rear, both solids. I can only say from the marking on the bag if Plaintiff's Exhibit 10 will fit or not the Whitehead & Kale wheels on the tractors I sold. A Whitehead and Kale wheel requires a chain shorter on the inside, both chains and side members are the same, I mean during the taxable period.

Redirect examination.

By Mr. Swindler:

I don't know all of the wheels manufactured by Whitehead and Kale during the taxable period. The Whitehead [fol. 177] and Kale make all types of wheels. They have

extensions that go on to a rubber tired wheel, which is a steel flange, which doesn't interfere with a chain as far as the general operation of a rubber tired wheel is concerned. Those I saw during the taxable period used the standard size chain.

Recross-examination.

By Mr. McMahon:

I have never seen a Whitehead & Kale wheel that required a chain longer on the outside than on the inside.

CHARLES A. KELLOGG, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was Chief of the Long Hill Fire Department, Long Hill, Conn. We had a Reo chassis with a Peter Purse equipment, which I operated myself, using Weed Chains on the tires of that vehicle, which came to us completely made up as a piece of fire apparatus. I used Weed Chains on two rear wheels only, size 33 x 5. I ordered the chains from the American Hardware Company, Bridgeport, Conn., and the fire company paid for them.

Cross-examination.

By Mr. McMahon:

The Reo chassis was a small truck, a truck chassis.

[fol. 178] A. L. LUNDQUIST, a witness, whose deposition was taken on behalf of plaintiff, at Minneapolis, Minnesota on the 17th day of August, 1931 and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, inclusive, I was in the employ of the Minnesota State Highway Commission with headquarters at St. Paul, Minnesota. I have been in the employ of this commission since 1919 as parts manager and buyer of parts and accessories for trucks and automobiles and tractors. During that period I purchased Weed chains made by the American Chain Company from jobbers in the Twin Cities for use in snow-plowing and pulling graders in the spring of the year in the mud. I bought such chains for tractors and trucks—no special chains for tractors. I did not buy chains specially designed for tractors. Chains were specially designated for tractors and other chains for trucks. Chains might have been specially designated for tractors and other chains for trucks; we did not specify for tractors or trucks; we used them interchangeably for trucks and tractors. I purchased them by size. The chain sizes we used on trucks and tractors were 36 x 6 pneumatic, 38 x 7 pneumatic, 40 x 8 pneumatic, 42 x 9 pneumatic. We also used 36 x 10 solids, 40 x 5 dual solids, 40 x 6 dual solids. In storing chains we did not keep those for trucks separate from those for tractors. Those chains were sent out to our different districts on requisitions from them. We sent [fol. 179] them to the districts where they were needed. There are sixteen districts in the state. I heard the testimony of William A. Palmer, foreman of District No. 9 and his requisitions for chains as covered by his testimony were typical of the other fifteen districts in the state. His district is typical of the other fifteen districts and the method of doing business in District No. 9 is similar to what it is in the other districts. In the fall of the year we would send out circulars to the different districts as to what their chain requirements are going to be for the year. We totaled these up and bought the chains and shipped them to the districts. We always kept chains in stock so we could furnish the districts with chains as stocks were depleted. Those chains were used principally for snow removal and pulling road drags. If a person representing one of these districts came to my office or place of business and asked for chains for use on trucks I would deliver such chains to him and if a man ordered a set of 40 x 5 dual chains for tractors, I

would take them off the same pile that I would if a man ordered 40 x 5 dual for a truck. These chains were in sacks with the size and name of the company that makes them on the sack, the American Chain Company and the size of the chain in inches. There was no marking showing which were truck chains and which were tractor chains. They ordered by size and we furnished them by size. I had occasion to see the chains used on account of operating snowplows on tractors and trucks out of our central shop. We did not make tests before we sent them out. Tests were [fol. 180] made afterwards on actual conditions and covered both the removal of snow and pulling graders in mud. I have seen chains put on either trucks or tractors without any change being made in the chains as long as the tire size is the same. There were no peculiar characteristics in chains that were to be used on trucks different from those that were to be used on tractors and I could not tell on delivering a pair of tire chains whether they would be used on trucks or tractors. I am speaking of Weed chains made by the American Chain Company during July, 1922 to June, 1924, inclusive. In 1929 we started buying other makes of chains. I would say our purchases amounted to around $10,000.00 a year during those years.

Cross-examination.

Read by Mr. McMahon:

You cannot use a 36 x 6 pneumatic with a 36 x 10 solid. You cannot interchange a 36 x 7 pneumatic with a 40 x 5 dual solid. A 42 x 9 and a 40 x 6 dual are not interchangeable. To my knowledge no chain has ever been made specially for tractors. Tractors and trucks came into common use in 1919 and 1920. The trucks came first and I would say trucks had chains before tractors came into existence. I would say that a tractor chain could be made different on account of the extra cross links in them, but then again those extra cross links are also desirable for truck use. Some times a chain does not have enough cross chains and extra cross chains are put in, especially adapted for tractors and also for trucks and that is for a wide tired truck. What [fol. 181] I mean by that, is extra cross chains, so that the spacing between the chains are not so great. I would say the chain manufacturer takes care of the duty requirements

of a chain for use on a tractor in his different sizes of chains. As to the tensile strength I would not know anything about the duty requirements of a chain marked for use on a truck. As far as chains are concerned, to my knowledge, truck chains and tractors especially—there is a regular truck chain and a heavy duty chain used on tractors or trucks as specified by the buyer. I am speaking particularly from the practical observation and what I saw and I have no intention of conveying the idea that I am at all familiar with what is known to engineering as duty requirements. We have a greater number of trucks than tractors in use in the State Highway Service. I would say about 33½% are tractors and the balance 66½% are trucks. We also have a number of passenger cars which use chains too. During 1922 to 1924, inclusive, we had many of the so-called army trucks, over a 1,000 of them which we received as an allotment from the Federal Government. We used those trucks for pulling graders and snow removal in the winter. They used them constantly, as a matter of fact most of the districts used these trucks right along for grading work and road work. The tractors are not necessarily used mostly on new construction work. They use them for maintaining roads and dragging roads. Today most of the highway equipment is motorized. There are very few horses used on the road. The roads are maintained by tractors and trucks [fol. 182] with the graders and tractors built in one unit now. In 1922 to 1924 I would say that most of the tractors were independent of the grader, the tractor pulled the grader, but now they are built as one unit. In 1922 to 1924 the truck pulled the grader. At that time most of the road building of the state was inaugurated and we used these army trucks very extensively in grading, hauling and everything else. I bought parts and accessories for automobiles, trucks and tractors. We have a central shop at the fairgrounds in St. Paul that we furnish the rest of the districts parts and materials from. During the winter months we have two or three snowplows that operate out of that central shop to keep the state highways around the city open. As far as those two or three snowplows are concerned the central shop is just merely a maintenance unit, otherwise just a distributing point. I would say we used about $10,000.00 worth of chains in one year. That is an estimate on my part and not an actual basis. In other words it is a guess.

Redirect examination.

Read by Mr. Long:

During that period we generally used Fordson and International tractors. The size of chains used in the Fordson and International tractors were 40 x 5 duals. These sizes were also used on the five ton Pierce-Arrow and Government Liberty trucks, which used the same size tires.

Recross-examination.

Read by Mr. McMahon:

In other words I could take a chain off of the Pierce-Arrow [fol. 183] or the Liberty trucks and use it on the Fordson tractor. The Fordson tractor came into use, in my judgment, two or three years later than the truck came into use. We had chains in use on trucks prior to the time that we had the Fordson.

WILLIAM A. AHERN, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Day:

I am a plumber and am connected with the Branford Fire Department, Branford, Connecticut as Fire Marshal and Deputy Chief. During July, 1922 to June, 1924, inclusive, I was Fire Marshal. I am familiar with the fire equipment of the Branford Fire Department. During those two years we had a Packard Hersch—that is, a Packard chassis with Hersch fire equipment; a Pierce-Arrow with a Northern equipment and a Pope-Hartford chemical. On the Packard the tires were 36 x 6; on the Pierce-Arrow the tires were 35 x 5 and on the Pope-Hartford the tires were 35 x 4½. Those were pneumatic tires. In the winter during that period we used Weed chains on that apparatus on the rear wheels only. We used them almost constantly and kept them on in the winter. As far as I know these chains operate generally to keep cars from skidding on the road in wet weather.

Cross-examination.

By Mr. McMahon:

The Packard chassis was a truck chassis. The Pierce-Arrow was not a truck chassis. That Pierce-Arrow was [fol. 184] originally owned as a pleasure car by Mrs. Weibel here in New Haven. The Pope-Hartford was mounted on a regular fire chassis that was made by the Pope-Hartford people at that time. It was a regular fire chassis in the nature of a truck chassis. Some are regular fire trucks and some are made into fire trucks.

DONALD B. HOWARD, a witness, whose deposition was taken on behalf of plaintiff at Minneapolis, Minnesota on the 17th day of August, 1931 and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

I live in St. Paul, Minnesota and am a manufacturer. The names of my companies are the Andrews Heating Company, the Andrews Manufacturing Company, and the Glide Road Machinery Company. At the present time I am vice-president and general manager of these companies but during July, 1922 to June, 1924, inclusive, I was assistant purchasing agent. During the taxable period I know of the use of Weed chains manufactured and sold by the American Chain Company on our tractors and on glide road machines with solid and pneumatic tires and on our road drags which carry pneumatic and solid tires. We used chains quite regularly on those implements. We got those chains from the distributors of the American Chain Company and usually sent a set of chains with a tractor, not always, but [fol. 185] usually. Before the price was completed, the chains were included. During that period our shipments were very scattered especially in the Glide Road Machine Company, and I would say that it covered on the whole from twenty to twenty-five states. The purpose of using these chains in connection with the tractors and other implements we manufacture was very essential on account

of the variety of road conditions, and the unusual weight of the equipment, so that it was included to prevent skidding and give additional tractive power to the machines. I saw those Weed chains used on automobiles or trucks. I saw them used on trucks by Federal, state, or municipal agencies. I saw them in a number of states. I have seen them when we traveled—here in Minnesota more largely than anywhere else. As a usual thing a set of chains went with the machine, not always though. The time I have been engaged in manufacturing tractors and other implements varies for the different equipment, but I would say the manufacture of tractors has been extended since 1910 and that of road graders and road drags since 1921. I might qualify that by saying I was not with the concern prior to 1920 but I think they manufactured tractors as far back as 1905 and 1906. I am familiar with the use of chains on trucks and automobiles. The tire chains referred to can be used on tractors and road equipment as well as on trucks and automobiles. The sizes of these tire chains are 40 x 9 pneumatic, 40 x 8 pneumatic, 38 x 7 pneumatic, 40 x 5 solid and 40 x 6 duals. That covers our [fol. 186] purchases. We used those chains back and forth occasionally so they were interchangeable. At times when we needed to we would take the chains that we had from one machine and put them on another or occasionally on our pleasure cars. By pleasure cars I mean automobiles for the salesmen and in cases like that. We used them interchangeably on trucks and automobiles and tractors, not as a general thing but in emergencies. It did not require any particular change in the chain to make it adaptable to one or the other use where the sizes were correct. The machines we built were used in building and repairing public roads and were almost always moved or hauled by tractors. Some were handled by horses and some with light machines. Those tire chains were also used on our road machinery to some extent independent of tractors. Howard's Exhibit 1 is a picture of a McCormick-Deering tractor hitched to our road grader which was used to grade the Minnesota State Fairgrounds in September, 1922. The photograph does not show any chains on the tires at that time but I have seen chains put on those wheels. They were not used in this case because they were scraping down the race track but we regularly buy chains on that equip-

ment. Plaintiff's Exhibit 26 (formerly Howard's Exhibit 1) photograph of McCormick-Deering tractor hitched to Andrews road grader as identified by witness, offered and admitted in evidence. Howard's Exhibit 2 is a photograph of a tractor containing American Chain Company chains connected to our road drag or wheel road drag on which we put chains in muddy weather. Plaintiff's Exhibit 27 [fol. 187] (formerly Howard's Exhibit 2) photograph of tractors with Weed tire chains attached to Andrews road drag as identified by the witness, offered and admitted in evidence. Howard's Exhibit 3 is a picture of a McCormick-Deering tractor connected to one of our wheel road drags. Plaintiff's Exhibit 28 (formerly Howard's Exhibit 3) photograph of McCormick-Deering tractor connected with Andrews wheel road drag as identified by witness, offered and admitted in evidence. That photograph does not show any tire chains on the tires. I have seen tire chains placed on that tractor or the equipment. It is the same machine as Howard's Exhibit 1. Howard's Exhibit 5 is a photograph of a tractor containing American Chain Company chains, pulling one of our road drags in front of our factory at Minneapolis. Plaintiff's Exhibit 29 (formerly Howard's Exhibit 5) a photograph of Andrews road drag with Weed tire chains attached as identified by the witness, offered and admitted in evidence. Howard's Exhibit 6 is a McCormick-Deering tractor pulling our road drag and being tried out with American Chain Company chains on the rear wheels of the tractor for additional traction power. Plaintiff's Exhibit 30 (formerly Howard's Exhibit 6) photograph of McCormick-Deering tractor fitted with Weed tire chains as identified by witness, offered and admitted in evidence. Howard's Exhibit 7 is an advertising circular issued by our subsidiary, the Andrews Manufacturing Company of Minneapolis, Minnesota, showing in the picture at the top of page one of the folder one of our own [fol. 188] make of tractors pulling an Andrews dump wagon. American Chain Company chains are on the tires. Howard's Exhibit 8 is an electrotype from a photograph of our own make of tractor containing American Chain Company chains on the rear wheels, connected to one of our Andrews self-loading dump wagons. Howard's Exhibit 9 is an electrotype from a photograph of one of our own make of tractors containing American Chain Company

chains on the rear wheels and drawing Andrews self-loading and unloading snow wagon unloading snow into a truck in the City of Minneapolis, the truck wheels of which are fitted with the American Chain Company chains. The truck also has chains as well as the tractors that are made by the American Chain Company. We put Weed chains on the trucks as well as on the other equipment. Howard's Exhibit 10 is a reproduction of a photograph of our own make of tractor having solid steel rims fitted with Weed tire chains drawing an Andrews self-loading snow wagon near our factory in Minneapolis. Howard's Exhibit 11 is a reproduction from a photograph of a McCormick-Deering tractor drawing an Andrews self-loading snow wagon in front of our office in Minneapolis. The tractor of which is fitted with American Chain Company chains on the rear wheels for tractive power. That implement is for loading and hauling snow from the streets. Howard's Exhibit 12 is a complete folder or circular advertising a number of our machines but the name of Andrews Manufacturing Company is a subsidiary of the Andrews Heating Company owning all of the stock of the Andrews Manufacturing [fol. 189] Company. The purpose of the folder was to show the use of machines in action for the purposes for which they were intended and in an abstract way show the use of tire chains on such vehicles although it did not have in mind demonstrating the use of the tire chains. They were used for the utility need of the chains themselves at that time. Plaintiff's Exhibit 31 (Howard's Exhibits 8 to 12) circular of the Andrews Manufacturing Company containing electrotype of self-loading and unloading wagons with tractors, etc., as identified by witness, offered and admitted in evidence.

Cross-examination.

Read by Mr. McMahon:

A 32 x 9 Pneumatic American Chain Company chain will not fit a Ford car, a Chevrolet car nor a Buick car. I don't know if a 40 x 8 will fit the same kind of cars. We use standard pneumatic tires on the road drag. At this time they are balloons and I think in 1922 to 1924 they were standard high pressure tires. A 42 x 9 will fit some trucks. A 48 x 8 will fit a Quad truck. It will not fit a Ford truck

nor a Chevrolet. I don't know if a 40 x 5 solid will fit a semi-balloon pneumatic standard tire on a Buick, Cadillac or Lincoln. There is a difference in the size and weight, etc., of the American Chain Company chains of the numbers I have been talking about. The difference is in the weight, lengths and measurements and I think there is a variation in the links, that is in the weight of the links made of steel wire. I don't think a 40 x 5 chain that I have sold for use on a solid tire is heavier than a 40 x 9 that I sold for use [fol. 190] on a pneumatic. They are different things. The difference I have in mind is principally one of measurement, I cannot say about the diameter of the wire used in those two particular sizes. The question of requirements between a Quad truck and Ford delivery truck is always a varied thing. The measurement duration is more important than the size or weight of the chain links as to what a man would use would depend a good deal upon what was available and the condition of the roads. I would not say that a chain used on an ordinary Ford passenger automobile would last very long on a five-ton loaded truck. When we bought them for the use we had in mind and picked out the size chains by sizes and the weight usually was proportionate to the size measurements. The numbers that I gave are chains we picked out as being adaptable to our specific types of use. We would go up and fit them from the stock here by these numbers, but not as designated for tires on tractors or automobiles or anything of that kind. We bought just by the numbers themselves. We knew our own uses and knew the type of chain we wanted to fit best for each of these specific uses. I am not a graduate engineer. I know something about the duty requirement of a five-ton Mack truck as relates to chains. I would pick out for a Mack truck pneumatic tires quite a heavy chain. I have never had any experience in the matter of figuring traction or friction with respect to the duty requirements of Mack trucks nor anything to do with the engineering phase of it. In picking out a heavy chain for [fol. 191] a five-ton Mack truck I would do so from practical knowledge, merely basing it on their relation to the sizes with other trucks of five-ton capacity in general. I never put any chains on a Mack truck that I remember but I have placed chains on five-ton trucks of other makes. I could not tell you as to the number of tractors, road building

machines, etc., that we sold to municipalities which were equipped with American Chain Company chains. We have 6,000 machines out—of the glide machinery, and I don't know how many tractors. I could not say. I have no idea of how many of these chains that are used each day or each month or each year on the machines. When I speak of the different chains being used I mean that I have sold the equipment and supplied the chains but beyond that I have no knowledge whatever except the specific instances that I have testified to although I have some knowledge of the use of them in actual service but I have no record from day to day of any quantity—any large proportion of the total machines outstanding. My knowledge is no more limited than any other manufacturers would be in that respect. We have not put in any part of our investigation in the use of chains. When I sold the tractor and supplied the chains the purchaser might have used them for something else although it would not have been possible for them to have used our machines in muddy weather without the chains. I know nothing about the number of chains put out by the American Chain Company during 1922 to 1924, inclusive except as to purchasing them ourselves. I have no knowledge whatever of the relation our total sales bear to their [fol. 192] total sales. It is out of the scope of my field to give you some idea of what the total number of tractors and road machines we manufactured and sold bear to the total number of automobiles manufactured and sold throughout our trade territory or in the United States. I think the use of chains on tractors was quite extensive, that is, I think that over 90% of our machines were equipped with chain supplies. I am not in a position to make any comparison. On tractors, trucks and road machinery the need for chains is more frequent and more general than on automobiles but as regards the respective numbers for the two classes of work and pleasure I am not competent to answer. I have no knowledge of the relative number of tractors in our trade territory as compared to the number of automobiles in use in that territory. I do not think there were more tractors in our trade territory than automobiles, I would guess the automobiles would preponderate and would consider that a pretty safe guess. We don't make any automobiles nor sell chains to automobile dealers but we use some of these chains on our

own cars. I put a pair of these chains that were meant for tractors on a Packard car of my own. That was the smallest pneumatic 38 x 7. I put on two of those chains, just a chain on each rear wheel. I could not say how many of those chains I have put on other cars. We have a habit of changing them once in awhile, occasionally, from some of the trucks over to our pleasure cars but I could not say what size we used, we put on anything that happened to be around that we could make fit. That was not a general [fol. 193] practice with me. I don't know that I made all the sales in those states to municipalities. We have sold highway commissions, road contractors and other contractors, some doing Government work, city work, township work and county road work. During those years I doubt that we sold any chains to highway commissions as that is a recent arrangement to consolidate purchases in the state capitols. In some places we sold through the state heads in the capitols of each of the states and we sell direct to the county and township commissioners. In 1922 to 1924 we sold direct to municipalities in between twenty and twenty-five states. As to the number of municipalities in those states I don't care to make a guess on that without looking up our records. I have seen some of the chains we sold commissions and municipalities in use on the roads when out inspecting but not the entire number of chains sold.

Redirect examination.

Read by Mr. Long:

Tire chains may be detached from automobile or truck tires and attached to tires of the same size on tractors, road equipment vehicles without any change or adaptation.

Recross-examination.

Read by Mr. McMahon:

I gave a little thought to the duty requirements of tractors, trucks and automobiles. It is a question of the excessability of the chain. In merchandising we take chains off of automobiles and put them on our tractors and road [fol. 194] machines. The chains go by number and it is possible to use some of the sizes that were used on pleasure

automobiles on certain sizes of our trucks and road machinery wheels or rims. I don't know what the chain engineer's comparisons are as to duty requirements but we go by size, numbers and measurements only and not by duty requirements. The duty requirements vary under so many different conditions that the chain might be too light for the use on a tractor or use on a pleasure car of some kind of wheels and on others it might be entirely sufficient.

Redirect examination.

Read by Mr. Long:

We have interchanged chains as a matter of expediency more than practice.

WILLIAM J. ANTHONY, a witness called by plaintiff being first duly sworn, testified as follows:

Direct examination.

By Mr. Day:

During the period July, 1922 to June, 1924, inclusive, I was Assistant Fire Chief in the Town of Stratford, Connecticut. On July 2, 1922, we purchased an A. C. Mack Fire Fighting Apparatus. That is a 3½ ton job put on to fighting equipment, equipped with solid tires and we also had a Commerce chemical wagon. In January, 1923, we changed the Commerce and got a 1½ ton Federal with equipment of fire fighting apparatus with four pneumatic [fol. 195] tires. The Mack truck had solid tires and the Commerce had pneumatic and the Federal had pneumatic. The Mack had 34 x 5 fronts and 34 x 5 dual rear. The Commerce had 34 x 5 pneumatic all around and the Federal had 33 x 4 pneumatic all around. We used Weed chains on all three pieces of apparatus. We used them on all four wheels of the Mack and on the four wheels of the Commerce. We put the chains on when the weather became bad in October or November, just as soon as the first sleet and ice came, and left them on for the continuance of the bad weather, possibly until April.

Cross-examination.

By Mr. McMahon:

The A. C. Mack 3½ ton job is a truck and the Commerce chemical wagon is also a truck and the 1½ ton Federal job is a truck, that is all truck chasses.

WILLIAM F. COTTER, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

On July 1, 1923, I was in charge of the Automotive Department in the Pittsburgh District comprising the State of Ohio, West Virginia, nearly all of Michigan, and the Western part of New York State in the employ of the American Chain Company. After July 1, 1923, I was transferred to the New York District as district sales [fol. 196] manager in New York State territory comprising the entire state and Northern New Jersey, as well as the Metropolitan District of New York. The Automotive Division took in mostly the entire Weed Tire Chain Line and merchandising and selling. During July, 1922 to June, 1924, inclusive, I traveled very consistently and observed the use of Weed chains on fire apparatus, tractors, road maintenance machines such as graders, snow plows and similar vehicles. I saw Weed chains used on such vehicles and in the latter part of 1923 I saw them used on a road sprinkler, I believe it was on a Mack truck, in the Buffalo area outside of Buffalo, New York. It was my duty to be familiar with, and I was familiar with, all the chains manufactured by the American Chain Company during that period. The chains which the company manufactured and sold for automobiles and trucks were of the same design generally as those which they manufactured and sold for tractors, road maintenance machines, and fire apparatus. My statement is that the design of chains for all of the vehicles named was substantially the same. I was familiar with the Whitehead and Kale wheels during that period. They manufacture a wheel with what they call an exten-

sion rim for the mounting on an auxiliary tire when considered necessary. The wheel was designed for several reasons. Principally where an owner had occasion to propel the tractor over certain roads and not caring to tear up the road with the cleats and metal or steel wheels, this tire would raise the tire just high enough so as not to be destructive over any ground travelled on. The only change in the specifications for Weed chains for that par- [fol. 197] ticular wheel involved inserting 6 or 7 extra links on the inside of the chain, simply to lengthen it out and make it a little longer. We do not classify the sides of the chain. Ordinarily we would put the tire chains on with the end connecting hooks in the rear and run over and connect here. This would go on the inside of the wheel. In other words, we would loop the chain over the tire with the end connecting hooks here. This would be the inside of the wheel. On account of the additional circumference here, the chain requires about 7 additional links on the inside chain or rim chain as it is known in the trade. I saw some of these wheels in use. Not many were manufactured. It was a special and our sales were not of any great consequence compared with the regular standard chain. Whitehead and Kale also made what is known as the standard wheel and this was known as a special unusual size.

DANIEL M. HERTZFIELD, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922, to June, 1924, I was a salesman for the American Chain Company covering the entire State of New York, and it was necessary in the performance of my duty to travel over the entire State. At that time I observed Weed tire chains used on fire apparatus and tractors. In the City of New York I sold during that period [fol. 198] and still am selling to the Fire Department of the City of New York. I installed chains myself on rear wheels for them for testing purposes and I saw the fire trucks leave their stations and I have made various tests

regarding installation of chains for the fire marshal to satisfy him that my chains would fit correctly on account of the emergency when they might have to use them. I recall selling Weed chains for such fire apparatus of sizes 36 x 4 single solid, 36 x 5 single solid, 38 x 4 single solid, and 40 x 6 dual solid. Those are the standard sizes that the New York City Fire Department used at that time. We sold them other sizes such as 32 x 4, 33 x 4, the oversized tires 33 x 4½, 33 x 5, 35 x 5, and 37 x 5, mostly in pneumatic sizes for emergency wagons, also fire apparatus as far as I know and for all different uses that they have for those particular trucks. During this period I sold chains for use on trucks to a great many Ford dealers in the State of New York. I saw Weed chains used on the front wheels of tractors at Watertown, New York, and I had occasion to see, in fact I was called by the dealer to go out and make a sale and install the chains on the front and rear of this tractor which I saw in operation. The sizes of those chains were 30 x 3½ in front and 40 x 10 dual in the rear. That was a Whitehead and Kale job. In the course of my duties I was required to know all of the chains manufactured and sold and be familiar with them during the taxable period. During July, 1922 and June, 1924, inclusive, the Company did not manufacture and sell a chain specially designed for tractors, it was a regular truck chain with the exception of the Whitehead and Kale [fol. 199] wheels of which there were a very few. Most of them were standard wheels that they used as an attachment to raise that wheel so that it would not sink in the mud and which standard truck chains 40 x 10 dual would fit. Six or eight lengths were added to one side of the side chain of the Weed chain to make it suitable for that particular Whitehead and Kale wheel. My Company did not manufacture a chain especially designed and sold for use on trucks, we made only the standard truck chains that I know of in all the years I have been with the Company, as well as during the taxable period. Those truck chains are used on both trucks and tractors. My Company did not manufacture and sell chains especially designed for use on fire equipment, we used our standard truck chain. The standard automobile chain manufactured and sold by my Company was also used for fire equipment uses. My Company did not manufacture a chain especially designed

and sold for use on self-propelling motor driven machines such as excavating shovels, ditch diggers, graders, road scrappers, street sweepers and street sprinklers. They have had one design of chain ever since I have been with them. Weed chains were manufactured and sold generally according to the size of the tires irrespective of the vehicles on which the chains were to be used.

Cross-examination.

By Mr. McMahon:

The fire apparatus I speak of consisted of various types, such as fire trucks, etc. Plaintiff's Exhibits 8 to 11, inclu-
[fol. 200] sive, are the types of truck chains that were used by the fire departments that I testified about a little while ago, only the side chains were different than these. You have not got the side members for use. Plaintiff's Exhibits 4, 5, 6, and 7 contained in a bag marked "truck chains" are not necessarily for a lighter tire but are for pneumatic tires. There is a difference between a pneumatic tire chain and a solid tire chain. Plaintiff's Exhibits 1 to 7 are for pneumatic tires and 4 to 7 are for pneumatic truck tires.

JOHN J. HINE, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Day:

During July, 1922, to June, 1924, inclusive, I was Secretary to the Board of Fire Commissioners, Bridgeport, Connecticut, and one of my duties was the purchase of equipment for the fire department. During that period I purchased Weed chains for the fire department. We bought sizes 36 x 3½ solid, 36 x 4 solid, 36 x 6 solid, 38 x 7 solid, 36 x 5 solid, 38 x 5 solid, 38 x 3½ dual, 60 x 4 solid, 35 x 5 solid, 40 x 5 solid, 38 x 6 solid, 40 x 6 solid, 38 x 4 solid, 48 x 6 solid, 60 x 3½ solid, 42 x 5 solid, 34 x 5 pneumatic, 35 x 4½ pneumatic, 31 x 4 pneumatic, 32 x 4 pneumatic. Those chains were used during bad weather in the winter time on the front and rear wheels. The chains were at-

tached in the house the minute we got in slush or ice so as [fol. 201] to have them ready in case the bell hit. We purchased those chains through various jobbers, The American Hardware Store, Bridgeport, Connecticut, Post & Lester, and the Blue Ribbon Garage, in quantities. We bought the Weed chain and specified a specific size according to the size of our tires.

Cross-examination.

By Mr. McMahon:

Fire equipment used in Bridgeport consists of truck chasses and chemical apparatus, fire trucks, pumping engines, hose wagons, aerial trucks and chemicals, and after we purchased the chains they were turned over to our mechanical department for distribution to the various pieces of apparatus to which they belonged. We bought these different sizes of truck chains.

ARTHUR C. STORZ, a witness whose deposition was taken on behalf of plaintiff, at Omaha, Nebraska, on the 20th day of August, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922, to June, 1924, inclusive, I was Vice-President and General Manager of the Storz Western Auto Supply Company, Automobile Supplies Jobbers Wholesale, at Omaha, Nebraska. That Company was known as a wholesale automobile supplies jobbing house. The name [fol. 202] of Weed chains was used during that period to designate tire chains manufactured and sold by the American Chain Company. We started in business in 1911 and continued in that business to that time. We purchased a great many Weed chains every year during the taxable period from the American Chain Company, Bridgeport, Connecticut. I know of the use of the Weed chains on tractors during that period. They were quite generally used by contractors, by the State Highway Department, by County Road Supervisors, and Municipalities on their

street cleaning equipment, fire equipment, and police equipment. We sold Weed chains in Western Iowa, all of Nebraska, and parts of South Dakota, Kansas and Missouri. I saw chains used on the State Highway, in the Counties, and in the City of Omaha and City of Lincoln in my territory. I sold Weed chains that were put to such use on tractors. The more popular tractor sizes were 40 x 5, 40 x 6, 40 x 5 dual, 40 x 7, 40 x 8, 40 x 10, and 38 x 5 dual in that territory. Weed chains were in very general usage on tractors as a traction device between October and March of every year because we have a lot of snow out here. They were used for traction, non-skid devices. There was snow, and in those days we had a lot of mud roads in wet weather. They were absolutely necessary. I saw some of those Weed chains used on fire apparatus in Omaha and Lincoln that I know of. My conception of fire apparatus would be their equipment that they used in putting out fires. Fire engines and cars and water tower, etc. I sold Weed chains for such [fol. 203] use. There was quite a variation in size and fire equipment. The more popular stuff seemed to run about 38 x 5, 38 x 6, 38 x 7, some 40 x 10 and some 38 x 5 dual. I have seen Weed chains used on automobiles, trucks, and motor cycles for Federal, State, or Municipal governmental purposes. I have seen them used by the Post Office Department here, by the Police Department, and by the Fire Department in Omaha, and other cities of Nebraska, as well as on road equipment throughout the State, or in this territory. Weed chains to be used on automobiles and trucks have no peculiar characteristics or design which are not identical to Weed chains for use on tractors, fire apparatus and road equipment, the general design is all the same. There is a difference in weight. As the size increases the chains are of course heavier. Weed chains may be detached from automobiles or truck tires and attached to tires of the same size on tractors, fire apparatus, or road equipment. I cannot say that I actually saw any detached and put on, but the same size would be applicable. The size of Weed chains designated in my previous answer was sold by the American Chain Company to our Company.

Q. You are familiar with the claims that are made in these various suits are you not, and have been advised in regard to what these suits are for, being for the recovery or refund of taxes that have been paid?

Mr. McMahon: The Government objects to that question for the reason that it calls for an answer predicated upon hearsay testimony.

[fol. 204] Mr. Long: There is nothing to show how he got his information. He said he was familiar. Whether he got it from the pleadings or how—he said he had the information.

The Court: I will overrule the objection.

Mr. McMahon: Note an exception.

The Court: Exception.

A. Yes, sir.

Q. Were the Weed chains manufactured and sold by the American Chain Company, on which the taxes in these suits were paid, interchangeable for use on automobiles, trucks, tractors, fire apparatus and road equipment?

Mr. McMahon: The Government interposes an objection to that question for the reason that it calls for a conclusion of the witness; the witness has not shown himself qualified to answer; it usurps the power of the jury; it usurps the power of the Court, and no proper foundation has been laid. We press the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. Yes, sir.

During the years 1922, 1923 and 1924, we paid the American Chain Company from $70,000.00 to $110,000.00 a year, principally for tire chains.

Q. Of this amount, what per cent in value of the Weed [fol. 205] chains was used on tractors, fire apparatus and road equipment in your territory?

Mr. McMahon: The Government interposes an objection to that question for the reason that it is calling for a conclusion of the witness; no proper foundation has been laid; the witness has not shown himself qualified to answer, and it is immaterial to the issue in this case. We press the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. About fifteen to twenty per cent. in value.

Cross-examination.

Read by Mr. McMahon:

I sold a 40 x 5 chain which is quite a popular size for Fordson and International tractors that can be used on any vehicle that has a 40 x 5 tire, either hard or soft tire, principally hard tires in those cases. The 40 x 10 chain is of both constructions. There was a dual construction and then there was a tire 40 x 10 used on the Fordson tractor and International and some of the old trucks we had during the period after the war period. I think they were principally Libertys. You cannot put a 40 x 5 chain on a tire that takes 40 x 10 chains. They are not interchangeable with 40 x 10, but with another size. You can put a 40 x 5 chain on a wheel that will take a 40 x 5 tire. You can take a 40 x 5 tire chain and put it on a 38 x 6 tire. I think I told [fol. 206] you we had 38 x 6, 38 x 7, and 38 x 5 dual. A 40 x 5 will fit a 38 x 6 or 38 x 7, those or interchangeable. A 40 x 5 chain is used by a 38 x 6 tire when we might have 38 x 6 chains, for instance we use- to sell the storehouse in Lincoln in charge of road equipment, a number of different sizes and if they ran out of one particular size they would use another size that was interchangeable. This interchangeable proposition is more or less general. We did it here in Omaha ourselves when we ran out of a certain size, we substituted another size or sold the other size and I actually saw those people use them. I couldn't give you the name of any people in particular, only I know there was a general usage. You cannot take a 40 x 10 chain and use that on a 38 x 6 tire, that would not adapt itself very well. It could be used on a 40 x 8 and I would say a 40 x 8 could be used on a 38 x 6 as a practical general proposition. We did so use them. The people we sold them to did, and I have seen them use them. I have seen them in Douglas County, Nebraska, our local county, and fire equipment was used by them that way. I know of those two in particular that I actually have seen. I could not say as to the number of chains used that way by those two people. There were more than one pair of chains. There was a considerable number. We took care of their equipment in bad weather. I never constructed nor designed any tire chains. I don't know what you mean, and cannot tell you the exact measurements, but I can tell you the general principle of the traction

was that the chain was laid on the ground and therefore gave traction for the tires that run on top of it. I presume [fol. 207] these tire chain companies have engineers, for the reason that all manufacturers have engineers to build the best products that they know how. The tire chain that is used on the ordinary Ford pleasure car would not be interchangeable for use on a tractor. It is too small. That one is not interchangeable with very many sizes. The reason that it is not adapted for use on a tractor is that it is too small and too light. All chains, as the size went up, were increased in weight and construction, and heavier material. I did not file any of the claims filed in these suits. I did not pay any taxes to the United States or to the Collector of Internal Revenue for the American Chain Company. I do not know how much taxes were paid. I do not know how many sets of chains, taxes were paid on. Generally the duty requirement of a chain used on a fire truck is to give traction during bad weather on slippery roads. It is merely for traction purposes. I cannot tell you how many foot pounds of traction a fire truck requires in chain construction, they use the same chains that the other would. That is all I know. There was no special chain for the fire department. The advent of the automobile truck was first in point of time to the advent of the tractor. They used those chains for traction, but I could not tell you how many years before. I do not know the tensile strength requirements of a chain used on a tractor as compared to a chain used on an automobile truck, but the tire chain is the same. Some sizes were interchageable as I previously stated, you could take a 40 x 5 and fit it on a 38 x 6 or a 38 x 7 generally where the [fol. 208] circumference plus the diameter would reach approximately the same figure. A 40 x 10 chain was not made for use on a Buick automobile. There were not many Buicks that had them that size. I do not know what duty requirements are, I cannot give you the twist stress of a chain, size stress, and stress, applied power of motor and extent of load. I don't know them and am not familiar with those things. I think I sold tire chains to the Post Office Department, but I don't know how many. They usually made their purchase under contract bids, and we did not land very many of them. We didn't sell very many of them. Occasionally, we were the lowest bidder and got the contract, but in emergency cases they used to come to the store

when they ran out of chains at supply depot here and put them on. By equally adapted I mean interchangeable. They serve the same purpose as a traction device, the design is the same, the construction was generally the same, the weight varied by size. Practically they would be equally adapted if the weight varied. The division is so fine they have probably 8, 10, or 15 weights all the way through the line, and the division from one to the other is so small that I couldn't tell you exactly. The specific size of a chain for use on an ordinary fire truck varies according to the equipment. The more popular ones were 38 x 7, 38 x 6, 38 x 5 dual, and 40 x 10. We have a lot of fire engines in this town. They have water towers, hook and ladder trucks, and chiefs' cars, and so on. The hook and ladder is neither a fire engine nor truck. It is a fire apparatus I guess. I cannot give you the total number of [fol. 209] chains sold in the United States for use on fire engines. I don't know how many fire engines in my trade territory. Every town and hamlet has one at least, and the larger cities have more of them depending on the size of the city. We have a lot of tractors in our trade territory. We have a lot of automobiles in our trade territory, more of them than there are tractors. There are more automobiles than there are tractors, but they are not in usage any more, if they want to run them both in the same kind of weather. You cannot run a tractor in as wet weather as you can an automobile without chains. I don't know how many tractors there are in the United States as compared to the number of automobile trucks. I don't know how many tractors there are in my own trade territory as compared to the number of automobile trucks. The advent of the automobile was first or prior to the advent of the truck. I don't know the number of years. The first practical automobile was turned out around 1900. There were several, of course, before that. There never was a tire chain specifically made for a tractor. I never heard of one as a special tractor chain. As a matter of fact they applied the chain in existence at the time of the advent of the tractor to use on the tractor.

Redirect examination.

Read by Mr. Long:

In using the term equally adapted I mean for use on tractors as well as automobiles. In other words you could use them on the one as well as you could on the other.

[fol. 210] Recross-examination.

Read by Mr. McMahon:

It was not necessary for the tire size to be the same. Of course, you cannot take a smaller one and put it on a larger one, but you can take a larger one and put it on a smaller one. I never patented, secured letters patent, nor perfected the design of a tire chain, or a truck chain, or a tractor chain.

Harold W. Falls, a witness, whose deposition was taken on behalf of plaintiff at Kansas City, Missouri, on the 31st day of August, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During the period July, 1922 to June, 1924, inclusive, I was a buyer for the Richards and Conover Hardware Company. During that period we sold or used tire chains made by the American Chain Company designated as "Weed chains". Our regular trade territory is Kansas, and the Western half of Missouri, that we call the Kansas City trade territory, and the State of Oklahoma. We purchased the Weed chains that we sold in that territory from the American Chain Company of Bridgeport, Connecticut. During that period we sold Weed chains for tractor use. During the months of November and December of those years, I saw such chains used each year, and sold Weed chains for use on tractors to tractor companies, that is, dis- [fol. 211] tributing companies for the Fordson tractors. One is the Industrial Machinery Company of Kansas City, Missouri, which is a local distributor for Fordson tractors and tractor equipment machinery. We sold to various

Ford dealers who sold Fordson tractors in connection with their car business. Fordson tractors, regularly equipped with solid tires, would take a 40 x 5 dual. There were a few cases where they were pneumatic equipped, and the tire sizes ranged from 38 x 7 to 42 x 9. We have sold such sizes, sell them every year. Chains were used generally on tractors throughout the year. Under certain circumstances, it is impossible to move a tractor and do work with them without chains. In the majority of cases in the Fall season, especially during heavy snows, sleet, and ice that is true. During those periods a tractor could not operate without chains. I saw Weed chains used on fire apparatus in Kansas City, Missouri, Fire Department at fire headquarters, 11th and Central. I sold a great many Weed chains for use on fire apparatus, which were absolutely so used. Some of the sizes of chains sold for use on fire apparatus were 36 x 6 singles, 34 x 4.5 singles. By that I mean single solids, a single solid tire is just a single tire as the name would imply. Dual solids are two of the single tires mounted on one steel rim on one wheel giving more service traction. We had different sizes or shapes of Weed chains for these different tires. I saw Weed chains used on automobiles and trucks for Federal, State, or Municipal Governmental purposes in our territory, but I could not definitely state about motorcycles. I mean Post Office Depart-
[fol. 212] ment trucks and trucks of that kind. I saw tire chains on Post Office trucks, but I can't say that I have seen Post Office automobiles, small trucks, if that is what you mean, Yes. I saw them on Municipal Fire Department, Park Board, and State Cleaning Department vehicles. I have seen chains on the cars of the Missouri State Highway Commission in Missouri. I would say that we sold Weed chains for that use. I couldn't say to what extent. For the Municipal Governmnet we have sold a lot of them. To the Kansas City Municipal Government. I sold to the Highway Commission. I don't know to what extent during this period. I cannot answer that question because of the fact that the Missouri State Highway Commission is comparatively a new addition to the Missouri Government. I don't know that it functioned at that time. Jackson County Highway Commission bought chains for use on their implements in the construction and repair of highways. I have been engaged in buying and selling Weed chains since

about 1916. During that time I have familiarized myself with the demands of the trade for chains for use on automobiles, tractors and trucks, and daily come in contact with the purchasers of such chains for such use. As to Weed chains, for use on automobiles or trucks having peculiar characteristics, which are not identical with Weed chains for use on tractors, fire apparatus, or road equipment, there is nothing to prevent the use of a pleasure car tire chain on a truck, or a pneumatic truck tire chain on a solid tire, or a single or a dual other than weight of material that is used in the construction of the chain that would limit the life [fol. 213] of it. Weed chains may be detached from automobiles, or truck tires, and used on tires of the same size on tractors, fire apparatus, or road equipment without any change in the chains. I am not familiar with the particular chains involved in this suit, and I am only familiar with the entire line of the American Chain Company. The entire line of the American Chain Company tire chains is adaptable to various uses. Comparable sizes were adapted only for use on automobiles and trucks without any change. Assuming the taxes in these suits were paid on the general line of the American Chain Company, they are interchangeable for use on tractors, fire apparatus, and road equipment. Weed chains were of general use in my territory on tractors, fire apparatus, and road equipment as well as on automobiles and trucks. The same sizes of truck chains were interchangeable with the same sizes of fire apparatus chains because there is no difference between the truck wheel or tire used on pieces of fire apparatus and any other truck, because all it is is a truck. For instance, a 40 x 5 dual tire used on a truck, and it was the standard equipment size at that time, you could remove the tire chain from that truck and put them on a 40 x 5 tractor. Absolutely interchangeable. I would have to guess at the amount of business that we had with the American Chain Company on Weed chains, but I think it would be a conservative figure. Our business with the American Chain Company would approximate $50,000.00 annually with over 50% of that amount being in Weed chains.

[fol. 214] Cross-examination.

Read by Mr. McMahan:

I couldn't answer the question as to how many chains I sold for tractor use during 1922, 1923, or 1924. Can't give you the exact number on that. Those figures are available in the American Chain Company's office in their annual sales analyses, I would say. I am pretty intimately acquainted with tire sale business of our company in this territory in that I do know something about them. I sold these chains myself, personally. That does not mean all sales, but sales that I have in mind, I sold personally. My answer to the question with respect to the sale of chains for use on tractors applies to sales made by [illegible] and other salesmen in my Company. You cannot put a 4 x 4.5 single on a 40 x 5 single without lengthening the side chain. You can put a 40 x 5 single truck on a 40 x 5 tractor comparable sizes. By comparable size I mean sizes that interchange. The size on a truck and a tractor being the same, the truck chain would come right off the truck on to the tractor. For instance, if the truck, as I said, was equipped with 40 x 5 or 38 x 7, those truck chains would go on same sized equipment on a tractor. I mean you can interchange them providing the tire sizes are the same. Today on dry ground you could use a tractor without chains. You use tractors more without chains than you do with chains under a normal season. Chains are used in snow, mud, and ice. The conditions under which they use chains only are snow, mud, ice, sleet, excavating to get trucks out loaded over steep inclines where they can't get traction without, and [fol. 215] railroad yards. Chains are used in that manner the year around. You certainly don't use them for snow and ice today. The use of chains on trucks and automobiles and tractors during the period of snow, ice, and mud as compared to the general use of chains on automobile trucks or tractors throughout the year would depend altogether on the circumstances under which it operated. Normally a motor car will run more miles without chains than it will with chains in a course of a year's operation. That is true as applied to trucks and tractors, but you don't want to overlook the fact that when chains are necessary, that car cannot move without them, and you have been in that same position many times. The use of chains on auto-

mobiles, automobile trucks, tractors, fire apparatus, etc., is comparatively small as compared to the use of those vehicles over a period of a year, but over a period of the Winter season, the answer is, No. I would say the Winter season was from October 1, to the 15th of February. I have seen it in this city where it was necessary to put on tire chains for many days during the Winter season. I have seen it for thirty days here when chains were necessary consecutively because we got in shipment after shipment long distance, two years ago. My memory as to the weather during 1922 to 1924 is not that clear. I think the Capper publications will tell you that tractors operating in this territory are something between eight and eleven thousand. I cannot answer as to the number of fire apparatus in our entire trade territory. I cannot answer how many chains I sold during 1922 to 1924 for use on tractors in our [fol. 216] trade territory because being sold by us, obviously truck sizes are very often under times of emergency for tractor use. As to the advent of the truck or tractor I would say the truck was probably first. The advent of the automobile was first or prior to the advent of the fire engine and fire apparatus, but the fire apparatus came along at the same time the truck equipment came along. I have seen chains used on automobiles prior to the advent of the tractor and the fire apparatus. They used them for the same purpose that they use them for today on automobiles. The Weed chain was designed about 1900. I am not just exactly clear on that subject. It was shortly after the advent of the automobile. The source of my information is that I happen to be pretty well acquainted with some of the men connected with the American Chain Company. The duty requirement of a 30 x 8 single used on an automobile as compared to a duty requirement on a 30 x 8 single used on a tractor is determined by the amount of the load to be pulled, that determines the answer. I know if you will tell me the load, I will tell you whether it will pull it or not, the draw-bar pull. I will tell you whether 30 x 6 will pull it or not. The answer to that is that you take 36 x 7—if you were using 36 x 7, and I had 36 x 8, 38 x 7, 37 x 7, and even up to 40 x 8, or 42 x 9 in an emergency if a contractor would buy that chain and use it on that tire it would function properly because you take up on the side. You are familiar with that, that is only one illustration. Those are

not exceptional. I can start at the top of the American [fol. 217] Chain Company list and go to the bottom and tell you what size will work on another size. A 30 x 3.5, 29 x 4.40, 29 x 4.50, 28 x 4.75, 30 x 4.50, any one size of those chains will fit any of the others. I mean that I can take a 28 x 4.75 and put it on any of those other four sizes and put on that size and that is true through the entire line. I am not an engineer. We have different weights on chains, there are different materials, different weights of materials used in different classifications of chains. I sold those different weights or classifications of chains during the taxable period July, 1922 to June, 1924. Where traction is desired I think a chain is adapted to any kind of vehicle. A freight car doesn't use rubber tires. I specified rubber tires in my answer. Comparable size of chains may be used on any type of vehicle having rubber tires, either solid or pneumatic. I don't know the number of tractors in use in my trade territory from July, 1922 to June, 1924, as compared to the number of automobile and automobile trucks used in my territory, I could not answer, it would be a guess. As a matter of fact, there are more automobiles and automobile trucks by far than there are tractors.

Redirect examination.

Read by Mr. Long:

I cannot answer definitely yes or no as to whether chains being used on a machine used in clearing oil and gas pipes, the machine being neither a truck automobile or tractor. I know of there being such a machine used for that purpose, but don't know whether I sold chains that were used on [fol. 218] that particular type of machine. I won't answer unless I know what I am talking about, and I don't know about that particular item.

WILLIAM D. KIRKPATRICK, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Long:

I am district sales manager of the American Chain Company for the territory of Montana, Wisconsin, North and

South Dakota, Colorado, Missouri, Kansas, Illinois, part of Michigan, part of Kentucky, and Indiana, with headquarters in Chicago, Illinois. During July, 1922, to June, 1924, inclusive, I was district sales manager in the Philadelphia territory, comprising the States of Pennsylvania, Delaware, District of Columbia, Maryland, part of Virginia, part of West Virginia, and the Southern part of New Jersey. During that period I sold or used Weed chains made by the American Chain Company. I have sold Weed chains since 1914, both wholesale and retail, and have been in contact with the retailers and consumers—fleet owners. A fleet owner is one who has a fleet of trucks that he uses in his business. In going around the country it was my business to observe all of the Weed chains that I could in use during the period July, 1922, to June, 1924, inclusive. I have seen Weed chains used on tractors, fire apparatus or road equipment during the taxable period. I saw chains [fol. 219] in use on fire apparatus in the City of Philadelphia, Trenton, New Jersey, Allentown, Pennsylvania, Easton, Pennsylvania, Pittsburgh, Pennsylvania, in fact, in all of the larger centers throughout the entire territory. A Weed chain of suitable size can be used just as well on a tractor as on a truck.

I have seen Weed chains throughout my entire territory. I know of the use of Weed chains on tractors during that period in my territory. I saw them in use on tractors at Chester, Pennsylvania, in and around the coal mines and in the Wilkes-Barre and Scranton Districts. I sold Weed chains that were put to such use. I saw and sold Weed chains for use on industrial trucks around manufacturing plants at the Baldwin Locomotive Works, Eddystone, the Bethlehem Steel Company at Bethlehem. They were small trucks used for conveying material around the industrial plants. The size of tires used on those trucks were 20 x 3½ single solids and I sold chains for that use. The complete sizes of Weed chains that I sold in my territory at that time are shown in the price list of the American Chain Company. I think we used practically all of those sizes in my territory. I sold practically all of the sizes as shown on the list of the American Chain Company price list in effect at that time. There were probably one hundred and some sizes at that time and it is pretty hard to name all of the sizes unless you let me refer to the price

list which was in effect at that time. As applied to tractors, fire apparatus, road equipment and small trucks, I have a list of the sizes in some papers on the bench. If [fol. 220] you would like to have me get it I will be very glad to give you those sizes. The small trucks I testified to were at the Bethlehem Steel Company, South Bethlehem, Pennsylvania, the Baldwin Locomotive Plant at Eddystone, Pennsylvania, in my territory. The orders for those chains passed through my office. The sizes that I sold for use on fire apparatus, trucks and tractors and road equipment were 38 x 7 single pneumatic, 40 x 8 single pneumatic, 33 x 5 single pneumatic, 32 x 4½ single pneumatic, 35 x 5 single pneumatic, 36 x 6 single pneumatic, 36 x 4 single solids, 36 x 4 dual solids, 38 x 4 dual solids, 40 x 5 single solids, 40 x 7 single solids, 36 x 3½ dual solids, 36 x 4½ dual solids, 40 x 6 single solids, 40 x 8 single solids, 38 x 7 single solids, 38 x 3½ dual solids. I was acquainted with the practical use of those various sizes of chains.

Q. You may state whether or not a chain of appropriate size that will fit on an automobile or a truck could be used on a fire apparatus or road equipment equally as well.

Mr. McMahon: The defendant objects to the question because it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. Yes, sir.

[fol. 221] Weed chains for use on automobiles or trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus or road equipment. Weed chains may be detached from automobiles or truck tires, and used on the tires of the same size on tractors, fire apparatus and road machines without any change in the chains. That is a circular describing Weed chains for International harvesters and trucks. Plaintiff's Exhibit 32—Circular describing chains for International Harvester Company's tractors and trucks offered and admitted in evidence. The Weed chains sold

during the taxable period in my territory for use on fire apparatus and road equipment did not differ in any way from Weed chains sold and used on private automobiles and trucks. They were interchangeable. During the taxable period I knew the design, sizes and purposes of all chains manufactured by the American Chain Company and sold in my territory.

Q. Did the American Chain Company design and did you sell in your district during the taxable period Weed chains for automobiles that differed in any respect from similar chains designed and used for tractors, road machines and fire apparatus?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent [fol. 222] and not the best evidence and usurps the power of the jury.

The Court: Overruled.

Mr. McMahon: An exception.

The Court: Exception.

A. No, sir.

Those small trucks I mentioned took a 30 x 3½ tire and a corresponding sized chain. Plaintiff's Exhibit No. 2 is for a tire size 34 x 4.95. As indicated on the bag, the marking is 34 x 4½ and it is bracketed with 34 x 4.95. As the balloon tire came into existence, we took certain sizes that were then made for standard sizes and marked them with the balloon size. The ballon tire did not in fact come into existence until after this taxable period, that is, the latter part of 1924, but that is the correct designation, 34 x 4.95, because that is the size that was in effect during the taxable period. That is a catalogue of tire chains put out by the American Chain Company with the date on it "Issued December 1, 1923." Plaintiff's Exhibit 33—Catalogue of American Chain Company issued December 1, 1923, offered and admitted in evidence.

Cross-examination.

By Mr. McMahon:

I cannot give you the name of any truck using a balloon tire during the taxable period. I cannot give you the name of any tractor using a balloon tire during the taxable period. As a matter of fact there were no tractors using balloon tires to my knowledge. Defendant's Exhibits F, H and I are the price lists I referred to in my direct examina-
[fol. 223] tion with respect to the year 1923. Those would be the lists that would be in effect from the time they were issued on down until other lists were issued during 1923, if any. Defendant's Exhibits J and G are representative of the same lists as F, H and I. Defendant's Exhibit F formerly marked for identification offered and admitted in evidence as a full exhibit. Sales of the chains described in Exhibit J were made during the taxable period. Defendant's Exhibit J formerly marked for identification offered and admitted in evidence as a full exhibit. Defendant's Exhibit G formerly marked for identification offered and admitted in evidence as a full exhibit. During the taxable period it was the policy of my Company to sell through jobbers, that is, direct to jobbers and the sales which I have testified that I made were made for a jobber to assist the jobber in making the sale and the American Chain Company did not sell the chain direct to the customer. I testified on direct examination that I was familiar with the design of chains made by the American Chain Company. Defendant's Exhibit A marked for identification describes or indicates a design of chain made by the American Chain Company during the taxable period. That design is similar to the design of chains described in Plaintiff's Exhibits 1 to 11, inclusive. I sold chains of that design during the taxable period.

Mr. McMahon: The defendant now offers in evidence Defendant's Exhibit A, marked for identification.

[fol. 224] Mr. Long: We object to this because it has no relation to the taxable period and shows on its face that it had expired before the taxable period began; that it is immaterial, irrelevant and does not relate to any issues in this case.

The Court: On the direct examination you asked the question of this witness as to the design and this is offered

in connection with the design. Is not the testimony of the witness that this shows the design used in the taxable period? For that limited purpose it may be admitted.

Defendant's Exhibit A, for identification, laid in evidence as a full exhibit.

Part of Defendant's Exhibit C marked for identification contains a design of chain similar to the Weed chains which I sold during the taxable period but part of it does not. The illustrations show this type of adjuster as part of the chain. The chain itself is of the same design and the adjusters are not a part of the chains described in Plaintiff's Exhibits 1 to 11. I sold chains of that design during the taxable period. I sold adjusters during the taxable period also. Defendant's Exhibit C formerly marked for identification offered to show the design of chain and admitted in evidence as a full exhibit. Defendant's Exhibit E formerly marked for identification is of exactly the same design as formerly. I sold chains of the American Chain Company during the taxable period of that design. It has another adjuster in that design and is not the same as the chains [fol. 225] denoted by Plaintiff's Exhibits 1 to 11, inclusive. I did not sell any of those adjusters during the taxable period with that design of chain. Defendant's Exhibit E formerly marked for identification offered and admitted in evidence as a full exhibit. Defendant's Exhibit B does not contain a design of chain similar or like the designs of chains described by Plaintiff's Exhibits 1 to 11, inclusive. The difference is that this is a diagonal cross chain whereas that is a parallel cross chain. Defendant's Exhibit D formerly marked for identification withdrawn by defendant. I know of my own knowledge that the advent of the internal combustion automobile was first in the point of time as compared to the advent of the internal combustion tractor. I saw chains in use on automobiles prior to the advent of the tractor. The advent of the truck was first in point of time as compared to the advent of the tractor. I saw American Chain Company's chains in use on trucks prior to the advent of the tractor. We had a classification of chains known as "truck chains." We have a classification of chains known as "Weed regulars." During the taxable period we had a classification of chains known as "Weed regular chains." During the taxable period we had a classification of chains known as "Weed regular

cord chains." During the taxable period we did not have a classification of chains known as "Weed regular balloon chains." That is a Weed chain chart, that is, a price list "Revised September 1, 1928." That contains price lists that are similar or like the classifications of chains and price lists which I have been testifying to [fol. 226] here. Defendant's Exhibit K—American Chain Company chart showing price list (photostat copy substituted) offered and admitted in evidence.

Redirect examination.

By Mr. Long:

I heard the testimony of Mr. Morris in which he stated that the chains on exhibit here were manufactured under the Parsons patent, were designed under that patent. What I meant by my answer to Mr. McMahon's questions was that I was testifying as to design only and not anything to do with patents. I don't know anything about the Parsons patent. I was referring in my answer to the design shown attached to the Parsons patent. I mean that picture. The design in Exhibit B is not similar to the chains introduced in evidence. It differs in that the chains on the floor have cross chains running parallel, whereas the chains on that design had the zigzag formation. In other respects the chains on the floor agree to the picture in Exhibit B.

Q. Did the American Chain Company design and manufacture during the taxable period and did you sell in your district during that period Weed chains that were especially designed for use on trucks?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and [fol. 227] not the best evidence and usurps the power of the jury.

Mr. Long: That is a different question, your Honor, from what we asked before in which objection was made. It omits the primary adapter and is confined to the taxable period.

The Court: It may be answered.
Mr. McMahon: Note an exception.

A. No, sir.
Q. Did the American Chain Company design and manufacture during the taxable period and did you sell in your district during that period Weed chains that were especially designed for use on tractors?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.
The Court: The same ruling.
Mr. McMahon: Note an exception.

A. No, sir.
Q. Did the American Chain Company design and manufacture during the taxable period and did you sell in your district during that period Weed chains that were especially designed for use on fire apparatus?

[fol. 228] Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.
The Court: The same ruling.
Mr. McMahon: Note an exception.

A. No, sir.
Q. Did the American Chain Company design and manufacture during the taxable period and did you sell in your district during that period Weed chains that were especially designed for use on self-propelling motor driven machines, such as excavating shovels, ditch diggers, graders, road scrapers, street sweepers and street sprinklers?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is

immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: The same ruling.

Mr. McMahon: Note an exception.

A. No, sir.

[fol. 229] WILLIAM E. WISSLER, a witness, whose deposition was taken on behalf of plaintiff at Chicago, Illinois, on the 1st day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

I am in the wholesale automotive business at Des Moines, Iowa, under the name of Herring-Wissler Company. I was engaged in business in Des Moines, Iowa, during July, 1922 to June, 1924, inclusive, under the name of Herring Motor Company. During that period I sold Weed chains made by the American Chain Company. Our Company has never handled any chains but Weed chains. We bought all sizes and styles they had and sold them for all purposes. I am manager of the Company and personally know of the buying and selling of Weed chains. I have been closely enough associated with the use of them to see them used under practically any and all circumstances and conditions. I have seen Weed chains used on tractors, fire apparatus and road equipment, during July, 1922, to June, 1924, generally in the State of Iowa and the City of Des Moines. During those days we were doing business throughout the entire State of Iowa and all parts of the surrounding states. That is where we operated in a wholesale way and had a retail automobile business, retailing Weed chains locally. I think I am familiar with the construction and use of Weed chains. A Weed chain of suitable size can be used just as well on a tractor as on a truck. I know of the use of Weed chains on [fol. 230] tractors during that period in our territory. I don't know that I could say that I saw chains used on a tractor except this, that we sold and did sell at that time chains for use on tractors. I think that during that time our Company was engaged in distributing tractors for the Ford Motor Company or soon after, I have not got the

date in my mind but anyway we had plenty of experience in tractors, that is, Ford tractors. We sold the Ford tractors. Of course, we had had experience with a lot of them, and we sold equipment for tractors. We also sold Weed chains that were used in connection with the tractor wheel, that is, all sizes generally. Tractors took larger sizes, of course, but they were sizes that were also used on trucks. I would say that where chains were needed on tractors that Weed chains were generally used. I would say they were used generally on tractors used on farm land at that time. I saw Weed chains on fire apparatus in the City of Des Moines and sold them for that use. I imagine we sold the fire department in Des Moines because we sold them everything else that they wanted. The size of chains that were sold depended upon the size they needed. We could sell anything that they needed for their apparatus, that is, for their cars and fire apparatus, automobiles and equipment. I saw Weed chains used on automobiles, trucks and motorcycles for Federal, State or Municipal governmental purposes in our territory. I saw them in the City of Des Moines and out in the state and sold Weed chains for such use. Not all tractors have rubber tires, but there were lots of tractors equipped with rubber wheels. Those [fol. 231] could use chains and did use chains. Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus or road equipment. Weed chains may be detached from automobiles or truck tires and used on tires of the same size on tractors, fire apparatus or road equipment, without any change in the chains. I think Weed chains were in general use in our territory on tractors, fire apparatus, police and road equipment, as well as on automobiles and trucks. Suitable sizes of Weed chains used generally on automobiles and trucks were interchangeable and used on tractors, fire apparatus, police and road equipment. Weed chains sold during the taxable period in our territory for use on fire apparatus, police and road equipment did not differ in any way from the Weed chains sold and used on private automobiles and trucks. They were interchangeable. Weed chains sold during the taxable period in our territory for use in automobiles or trucks for Federal, State or Municipal government purposes did not differ in any way from the Weed

chains sold and used on private automobiles and trucks. They were interchangeable.

Q. Was there any peculiar characteristics about a Weed chain during that taxable period that prevented it from being sold for general use as a commercial commodity, and which made it primarily adapted only for use as a component part of a privately owned automobile or truck?

Mr. McMahon: The government interposes an objection for the reason that no proper foundation has been laid, the [fol. 232] witness has not shown himself qualified to answer, it calls for the conclusion of the witness, and assumes facts to be true not shown by the evidence and usurps the power of the jury and the court. We press the objection as stated.

The Court: Overruled. Admitted.

Mr. McMahon: Note an exception.

The Witness: Will you read the question please?

(Question read.)

The Witness: No, there was not.

Mr. McMahon: The Government moves to strike out the answer of the witness on the ground that it is usurping the power of the jury and that it states a conclusion and usurps the power of the court.

The Court: Motion denied.

Mr. McMahon: Note an exception.

From July, 1922, to June, 1924, inclusive, all of our business with the American Chain Company at that time was for chains and I would estimate that our business ran annually from fifty to seventy-five thousand dollars a year. We bought direct from the American Chain Company.

Q. What per cent, in dollars value of Weed chains that you sold, was used on tractors, fire apparatus, police and road equipment, in your territory?

Mr. McMahon: The Government interposes an objection to the question for the reason that the witness has not shown himself qualified to answer. It calls for the conclusion of [fol. 233] the witness, and assumes facts to be true which have not been shown by the evidence. The Government presses the objection.

The Court: Overrule the objection.

Mr. McMahon: Note an exception.

A. Under ordinary circumstances, ordinary conditions, in my territory, I estimate that it would be five to ten per cent.

Mr. McMahon: The Government moves to strike the answer of the witness for the reason that it is an estimate or guess and not the best evidence obtainable and is the result of a conclusion on the part of the witness.

The Court: Motion denied.

Mr. McMahon: Note an exception.

During part of that time we had a contract with the Post Office Department to furnish chains for them which was made with the Post Office Department at Washington and we shipped chains wherever they wanted us to ship them. We shipped them all over the middle west. That contract was during the year 1922, and may have extended over into 1923, but I will say during 1922. Our contract was in effect during 1922 and was for a year at a time and I know that we supplied them some chains during 1922.

Q. During the time that that contract was in force after July 1, 1922, what do you say as to the per cent of business that you had during that time on Weed chains to be used on [fol. 234] tractors, fire apparatus, police and road equipment and the Post Office Department?

Mr. McMahon: The Government interposes an objection for the reason that the witness has not shown himself qualified to answer, that it is not the best evidence obtainable, it calls for the conclusion of the witness, and assumes facts to be true not shown by the evidence. The Government presses the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

The witness: Will you read the question please?

(Question read.)

The Witness: I would have to make the percentage at 20%.

Mr. McMahon: The Government moves to strike the answer of the witness as being an estimate and not evidence or facts.

The Court: Motion denied and an exception.

Mr. McMahon: An exception.

Cross-examination.

Read by Mr. McMahon:

I believe I stated that tire chains used on automobiles and trucks were interchangeable for use on tractors and that they were so used. I don't think I ever sold a tire chain in our territory for use on a tractor having a steel wheel. I think I stated in one of my answers that the chain which could be used on a truck was equally adapted to the same size and style wheel on a tractor providing both had [fol. 235] rubber wheels. I don't know the number of tractors in use in our trade territory during July, 1922 to June, 1924, inclusive, of each year. I cannot give you from memory what the total number of tractors used in our territory during the taxable periods referred to bears to the total number of automobiles and trucks in our trade territory during that period I could give you the facts if I was back home and could look them up. I don't know what size tires Quad trucks have. You cannot put a 30 x 3½ Weed chain on a tire that normally uses a 40 x 5 chain. Tire chains are interchangeable where the tire size requirements are the same. There might be a different size chain used. I am not sure of that, but I will say that the same size chain could be used on both tires. If you have two tires of the same size and specifications your chains will fit them both. Now, if you have two balloon tires of the same size your chain will fit them. If you have two solid tires of the same size they will fit them, and if you've got two other tires of the same size your chain will fit both. I don't know if a chain will fit a solid and a balloon tire, it might, I am not sure of it. I never put one on a balloon tire that I took off a solid tire. I mean by equally adapted that a chain that is built to fit a tire of a certain size is equally adapted to another tire of the same size. That is true if the duty requirements are the same and I don't think it would be true if the duty requirements are not the same. All trucks, tractors, and automobiles do not require the same weight of chain. All trucks, tractors and automobiles do not require chains of the same tensile strengh. During [fol. 236] July, 1922, to June, 1924, inclusive, I sold chains made by the American Chain Company of numerous sizes, weights, and tensile strength. I account for the difference in weights and tensile strength of the chains made by the

American Chain Company during 1922, 1923 and 1924, by the fact that it does not require as heavy a chain on a light car as it would on a truck. I would say that a light car required a chain of a lighter design than is required of a chain for use on a heavy truck. I never had anything to do with the design, or the figuring of duty requirements of chains. The advent of the automobile was first in point of time as compared to the advent of the truck. The advent of the automobile and truck were first in point of time as compared to the advent of the tractor. The automobiles and trucks used chains prior to the advent of the tractor.

Q. As a practical matter of fact proposition, Mr. Wissler, were not the chains formerly used on automobiles and trucks, used on tractors upon the advent of the tractor?

A. I would answer that this way: The same design of chain used on trucks at the time of the advent of the tractor were that of the tractor.

Q. Do you know of your own knowledge, if the chains that were being sold and used on automobiles and trucks, were sold and used on tractors, upon the advent of the tractor?

A. We sold chains for specific use on tractors.

Q. Were they special chains?

A. No.

Q. Were they chains that you had formerly sold, were they chains similar to those you had formerly sold, for use on automobiles and trucks?

A. They were.

[fol. 237] I mean by equally adapted that the chains sold by the American Chain Company during 1922, 1923 and 1924, could be used on tractors as well as on trucks and automobiles, providing the size requirements were the same, and providing the tensile strength and weight requirements were the same. During the years 1922, 1923 and 1924 I actually sold some of the chains I have mentioned having been sold by my Company. I don't know how many I sold. I sold comparatively few as compared to the total number of chains sold by my Company. I don't know how many days out of each month during 1922, 1923 and 1924 that I saw the Post Office Department, the City of Des Moines, the Fire Department, or any other governmental agencies using tire chains. I would say that during 1922, 1923, and 1924 as a general thing tire chains were not used daily in

our trade territory. The use of tire chains was chiefly or principally determined by the weather conditions in our trade territory during those years. The percentage of Weed chains which we sold in our trade territory during July, 1922 to June, 1924, inclusive, for use on tractors having rubber tires, would be small as compared to the use of Weed chains on trucks and automobiles in our trade territory during those months.

Q. Would you say that tire chains are chiefly used on trucks and automobiles as a general thing?

A. Of course, there are infinitely more cars and trucks in use than there are tractors using chains.

Q. Do you know that from observation and your ex [fol. 238] perience in the business in which you have been engaged?

A. I think so.

Q. Well, as a matter of fact Mr Wissler, does not practically every one know there are more chains used on automobiles and trucks than there are on tractors?

A. I think that would be the judgment of any intelligent person, yes, sir.

I don't know how many there were during 1922, 1923 and 1924. I don't know how many motorcycles were used for governmental purposes during those years in our trade territory. We kept the same kind of record on those sales of tire chains made by the American Chain Company during the months of July, 1922, to June, 1924, inclusive, as we did on all others. I didn't know I was asked on direct examination if Weed chains were in general use on tractors in our trade territory or that there was such a question asked. I don't think chains were in general use on steel wheels during 1922, 1923 and 1924. I think tractors used for farming purposes in our trade territory in 1922, 1923 and 1924 having rubber tires, were used without using Weed chains. It is not generally necessary to use chains on tractors having rubber tires during dry weather.

Redirect examination.

Read by Mr. Long:

Road conditions in Iowa in our territory during the taxable period were pretty much "in the mud." There were lots of tractors used and there were lots of tractors used

for road work, and I think they were used for snow removal during certain months of the year during the taxable pe-
[fol. 239] riods. Everybody knows that our roads in Iowa are liable to be tied up at any time after November 1 until the 1st of April. We had road equipment to remove snow and other obstacles from the road during those months, and I think we did during the taxable periods. I think much of that road equipment that was in use at that time operated by tractors.

Recross-examination.

Read by Mr. McMahon:

No one can say without going back and investigating the records that the roads in Iowa generally were tied up everywhere there a month at a time, but I do say that natural weather conditions out there are liable to tie our roads up and it might be for a month at a time. I do not know of any time during 1922, 1923 or 1924 that our Iowa roads were tied up for a month at a time. I do not know of any time now that they were ever tied up more than a day or two during those years. I think that during July, 1922, on through June, 1924, inclusive, we sold truck chains to the Iowa Highway Commission. I would not say positively that we supplied chains for all the governmental trucks which they used in road construction work in our trade territory during those months. I can not tell you how many trucks were allotted Iowa from the fleet of "army trucks." I do not know whether or not any released army trucks were used in building Iowa roads during 1922, 1923, and 1924. I do not know how many tractors were in use in road work during that period. I know of my own knowledge that some were in use but I don't know how many.

[fol. 240] Leona E. Dilger, a witness, whose deposition was taken on behalf of plaintiff, at Chicago, Illinois, on the 1st day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, inclusive, I handled the correspondence and orders that came in to the Ameri-

can Chain Company headquarters in Chicago for what is known as the Chicago District of the American Chain Company, which comprises Illinois, Indiana, the Western part of Michigan, Wisconsin, Minnesota, North Dakota, South Dakota, part of Kentucky, Nebraska, Missouri, Kansas and Colorado. I believe Oklahoma and Iowa at that time were in our territory. When the orders would come in by mail and by telephone and telegrams I would write up the orders and send them over to the warehouse to be filled and sent out. On such orders I used the name of Weed chains for designating tire chains. My opportunity for seeing the use of Weed chains has been mostly around Chicago. I have seen Weed chains used on tractors, fire apparatus, road equipment and police equipment in and around Chicago and the Northern part of Indiana. The orders would designate the use of the chains, what they were for, they would say trucks or tractors or automobiles, in all instances. I am acquainted with the different sizes of Weed chains. A Weed chain of suitable size can be used just as well on a tractor as on a truck. I participated in selling 40 x 5 single solids and dual solids, 36 x 6 single [fol. 241] solids, 40 x 8 single solids, 38 x 4 dual solids—I understand you want this for truck sizes. I participated in selling all sizes, 30 x 3½ single solids, 36 x 3½ single solids, 36 x 7 single solids, 38 x 7 single solids, 33 x 5, 34x 5 and 35 x 5 single pneumatics, 36 x 5 single pneumatics, 36 x 8 single pneumatics, 36 x 10 single solids, and 40 x 6 dual solids. These sizes were used for road maintenance and road equipment and for the Fire Department of the City of Chicago and other municipalities and tractors. I saw Weed chains used on automobiles, trucks and motorcycles for Federal, State, or Municipal governmental purposes in and around Chicago and we sold Weed chains for such use. The only case in which there was a difference or peculiar characteristics, about Weed chains used on automobiles or trucks and those used on tractors or fire apparatus or police or road equipment, was on W. K. wheels for Fordson tractors where the one side-chain was longer than the other. Those chains were used for Fordson tractors, size 40 x 5. I saw the use of these chains on road equipment, police equipment and fire apparatus, used principally in Chicago for that purpose and on the highways surrounding Chicago during the taxable period.

Cross-examination.

Read by Mr. McMahon:

As regards duty requirements of chains for use in connection with tractors as compared to the duty requirements of chains for use in connection with trucks, all I could say is for traction purposes. I do not know the kind, weight [fol. 242] and tensile strength of a chain required for use in connection with a Fordson tractor and an International Harvester Company tractor, commonly used and about which I have testified. I mean in stating that Weed chains of appropriate sizes were adapted for tractor and truck use, that is, providing the tire sizes are the same and the duty requirements are the same. I saw sizes of the chains which I have described as having been sold by the American Chain Company during 1922, 1923, and 1924, particularly the taxable period, used on automobiles, trucks and hearses, etc. I do not know the number of fire apparatus and different vehicles in the City of Chicago. I do not know the number of municipal vehicles, tractors, automobiles and trucks in use in the City of Chicago. From my observation around the City of Chicago and the outlying territory, I would say there were more trucks and automobiles in constant use than there were tractors, many more than tractors. The sales which I took part in were made to jobbers, distributors, manufacturers, and municipalities in some places. The municipal sales were small in comparison to the jobber, distributor and manufacturer sales. The Fordson tractor required a chain that was about a foot longer on one side than on the other. I have not personally examined the chains I saw on fire engines, tractors and automobiles in and about Chicago. I have seen them. I could tell they were American Chain Company chains by the connecting hooks which are distinguishing marks, and all the chains that I saw were chains made by the American Chain Company. I don't [fol. 243] recall any chains being sold by others than the American Chain Company during the taxable periods. There are other chain manufacturers in the United States. Their chains are sold in and around Chicago now. I don't recall right now as to the taxable period. Automobiles, tractors, and trucks did not require tire chains as a general thing in the Chicago trade territory during each day of the year. It is a fact that automobiles, tractors and trucks re-

quire chains only in bad weather, generally speaking. It depends on road conditions. The 40 x 5 Fordson tractor chain is used on a single or dual equipped tire. In using such chain on a truck tire, such use does not require the 12 inch additional length. That can be cut off in that case. The 32 x 3½ chain cannot be used on a truck normally using a 40 x 5 chain. We sold chains for use in automobiles, tractors, fire apparatus, and other things, different size trucks and different size cars. Under ordinary conditions a five-ton truck would require a heavier chain than the ordinary Ford roadster.

WALTER J. KRETLOW, a witness, whose deposition was taken on behalf of plaintiff, at Chicago, Illinois, on the 2nd day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

At the present time I am a salesman for the Manley Man- [fol. 244] ufacturing Company, an associate company of the American Chain Company in Chicago. During July, 1922, to June, 1924, I was warehouse manager for the American Chain Company at Chicago, Illinois. I know the American Chain Company tire chains as Weed tire chains or Weed chains. At that time I had no experience in buying or selling Weed chains, but being an employee of the American Chain Company I used Weed chains. As warehouse manager in Chicago my duties were to see that orders were properly filled, checked and shipped. Oftentimes I got the orders from Miss Dilger or George Kutz, or whoever would be in the office would telephone the orders to us over the telephone, and in a good many cases the jobber that ordered it would send the truck down, sometimes bringing the order with him, and other times telephoning it, and oftentimes individuals would bring the orders handed them by the jobbers, to pick up chains at the warehouse. A great deal of our business was transacted through jobbers. Our business was transacted with the user of chains only in cases where the jobber's stock was depleted and he had given the dealer an order on this particular jobber to pick

up the chains at our warehouse. The orders came to us in writing and orally. We have two ways of receiving our orders. Oftentimes if an order was urgent, as it often was in the case of storms, the orders would be telephoned and a lot of orders were written up at the office and carried by the office. The written orders that came to me from the office did not in very many cases designate the use of these chains. In some cases they were to be written up as regular [fol. 245] Weeds or deluxe regular Weeds, single pneumatic truck, single solids, dual solids. That is the way the order would be designated. Occasionally we would receive an order for some special size, say to fit a Fordson truck equipped with W. K., that is, Whitehead & Kale wheels, a special wheel for Fordson tractors. That chain was 12 to 14 inches longer on one side of the chain than the regular 40 x 5 chain. That wheel was made by Whitehead & Kale at Detroit and was a special size of Fordson tire. There was considerable of that business and oftentimes we would be out of this particular size and would assemble them in the Chicago warehouse. That chain would fit a truck if it had the same size tire. All of the orders, to the best of my recollection, were from jobbers. Oftentimes the individual owner would not only come in with his car, but with his truck, and we would fit the certain size chain to that particular wheel. We dealt in all sizes manufactured by the American Chain Company at that warehouse. The testimony of Miss Dilger as to the numbers of the different sizes agrees with my recollection of sizes used in that period, only a good many more sizes if you include passenger sizes as well as trucks. Passenger sizes were in addition to those that she mentioned. These chains were shipped to us from York, Pa., in barrels. We had bins there marked for different sizes and often carried a stock of chains loose in these bins. A good many of our orders were barrel shipments and others were individual orders shipped direct to the buyer. There were particular sizes in each barrel. Once in awhile we would have a mixed barrel. When we got [fol. 246] them in, we checked them and placed them in stock in the warehouse. We left them in the barrels. The chains were in bags in the barrels. There were a separate number of chains in each barrel and it depends on the size of the chain, how many are in a barrel, and we left them in the barrel until the orders came in. Everything had a place

according to size. We would place our regular Weed chains at a certain part of the building, running in sizes, our single pneumatics in another, our single solids in another, and single duals in another. We dealt by sizes. We acted no different on receiving an order for chains for a tractor than we did on receiving an order for chains for a truck because lots of times orders would come written up for a number of 40 x 5 single solid truck chains and again we would get another for 40 x 5 tractor chains which we know, unless specified W. K. was the same chain. At that particular time the only difference with relation to these chains was the W. K. Chains. That particular type of chain only fit the tractor made by them, but if we had a surplus stock of W. K. chains and someone wanted a number of 40 x 5 truck chains, we would cut off the extra lengths on one side of the chain. Outside of these special chains for special tires there was no difference in chains, except as to sizes, between chains made for use on trucks and for tractors. My work was solely in the warehouse. Occasionally if some rush order came in I would deliver chains to some part of the city or maybe on my way home deliver a pair. During the taxable period I think on one occasion I saw Weed chains [fol. 247] used on tractors. I saw Weed chains used on fire apparatus in the City of Chicago, hook and ladders and engines, in fact, I placed a pair of 38 x 5 regular Weed chains on the fire chief's car (the old Cadillac) at our warehouse. Those chains were no different in any way that I placed on the chief's car from the chains I would place on a privately owned car of the same make and size of tire. I would not say I have seen Weed chains used on police equipment, but I have sold, or delivered, or have filled orders for a good many chains of different sizes that were delivered to the City of Chicago. I am not in a position to say the purpose for which they were used, but I presume for all their officials to use. I filled orders for the City of Chicago designating delivery at 35th Street and also on, I think, Loomis Street, out of our regular stock that we sold for automobiles, tractors and trucks indiscriminately according to size. I filled their orders like that for other cities all over the Chicago territory. I could name the dates and probably a million and one cities but I would be here for two or three hours. It was generally cities of this territory, occasionally we filled orders for other territory out of Chi-

cago stock, like Tulsa, Oklahoma, we shipped an awful lot of extra heavy chains, I presume for the oil fields, and I would say several different orders went to municipalities. I filled orders for use in the construction and maintenance of roads during that period. Oftentimes orders came through marked for State highway commissions of this State or City and other places. That was true of Illinois [fol. 248] and other States in the Chicago territory. I couldn't say shipments were made direct to these commissions but there was a good many cases where jobbers would order them shipped to the State Highway Commission. The order would come through the jobber with instructions to ship to the Highway Commission. Those orders were by sizes and we filled them out of our regular stock. If we did not have them in stock we would assemble them in our warehouse the same as we would if they were orders for private automobiles or trucks. We had no special barrels or bins for State highway commissions, fire apparatus or police equipment. My duties during this period were in the warehouse and I am not very familiar with the use of these tire chains on various equipment, cars, and have not seen them operated. I filled orders for the Interior Department, Indian Reservation, but I don't know just how the orders were written up or anything of that kind but they were made to the Indian Reservation. The orders were written up first and sent over to us, maybe so many went to this service and so many to the other, of all sizes, regular car sizes as well as some single pneumatic trucks. I would not want to say positively that some could be used on tractors, as I think very few were tractors, it was mostly all passenger and single pneumatic truck chains that we shipped out of our regular stock. I don't know the numbers of those that went to the Indian Service, but it seems to me it would run pretty close to a hundred or better, something between 50 and 100 different places, that is, to different reservations.

[fol. 249] Cross-examination.

Read by Mr. McMahon:

As far as I know these orders must have come through the jobbers in the Highway Commission District. As far as I can recollect they would be marked by a certain jobber

and shipped to a certain highway department. Somebody took the order and we shipped them as specified on the orders and the fact that we shipped them to highway commissions led me to believe they would be used in road maintenance work outside of passenger cars if they were passenger cars, the chains should be with them too, I suppose, used for the same, or for their employees. I certainly would not think a passenger car chain would be used on a truck or on a tractor. I do not know of my own personal knowledge whether the highway commissions used those chains on trucks or on tractors. As to the chains shipped to the Federal Government during the taxable periods, I never saw those chains shipped and don't know whether they were used on trucks, pleasure cars or tractors. I have seen Weed chains used in and around Chicago on automobiles and trucks during the taxable periods. They were our regular sizes of chains which we sold for automobiles and truck use. The City of Chicago, as far as I can recollect, bought all sizes of chains, including cross chains, and the people of Chicago bought all sizes from the smallest size, to the 40 x 5 truck chains, the largest we make. Those were deliverd to jobbers in the city. I did not deliver them, I just filled their orders from the warehouse, but I saw chains in use on automobiles and trucks during the taxable [fol. 250] period in Chicago. I do not know how many tractors there were in use in the City of Chicago nor the Chicago trade territory during July, 1922 to June, 1924, inclusive. From my own personal knowledge and observation I would say there are more automobiles and trucks than there are tractors in the City of Chicago and our trade territory and I would say there are a great many more trucks and automobiles than there are tractors. As compared to the use of chains on automobiles and trucks during the taxable period, I would say the use of chains on tractors was comparatively small as compared to the use of chains on automobiles and trucks.

Redirect examination.

Read by Mr. Long:

The 40 x 5 chain, regular chain, could be used either on a tractor or a truck.

Recross-examination.

Read by Mr. McMahon:

In order to use the 40 x 5 Fordson tractor chain on a truck in some cases which I have seen they did not even cut the additional lengths off, but simply wired them back, to a part farther back and carried the additional lengths on the chain as surplus. The only instances I know where they cut them off during the taxable period was in our warehouse, when we ran short, as I think I said a while ago, if we ran short of regular 40 x 5 and had a surplus stock of 40 x 5 special chains, as we called them for W. K. wheels, why we would cut these additional lengths off, [fol. 251] rather than take the time to make the regular 40 x 5 chain. As a matter of fact the use of that Fordson tractor chain on trucks was limited only so far as our stock of chains was concerned in the warehouse.

George B. Kutz, a witness, whose deposition was taken on behalf of plaintiff, at Chicago, Illinois, on the second day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

I have been a salesman for the American Chain Company since 1919 continuously selling all types of chains manufactured by that Company throughout the entire territory of the Chicago District comprising Indiana, part of Kentucky, Illinois, part of Iowa, Missouri, Kansas, and Colorado. I was engaged in performing those duties during July, 1922 to June, 1924, inclusive, selling what is known or referred to as "Weed Chains" or tire chain grips. They were generally designated as "Weed Tire Chains." I did not sell any other tire chains outside of "Weed Tire Chains." During the taxable period we did not have the competition from other tire chain manufacturers that we have today. These chains were used on automobiles, trucks and tractors; as a matter of fact, they were used for other vehicles that were horsedrawn, such

as test vehicles used around county fairs to show the pull-
[fol. 252] ing power of horses. In one particular case I had a photograph of a vehicle designed by the Bureau of Animal Husbandry of the Iowa State Agricultural College which I first saw at the first State Fair in Iowa many years ago. These other vehicles were outside of automobiles, trucks, and tractors. I have seen Weed chains added on tractors, fire apparatus and road equipment during the taxable period in the Cities of Chicago, St. Louis, and Kansas City. I saw chains used on tractors in Kansas City that I can be specific about but I did not see any chains used on tractors in the City of Chicago. In Kansas City the chains were being used on tractors by the Union Pacific Railroad for shunting cars in the yards, for moving cars, also for handling baggage on the trucks around the terminal. Outside of Kansas City I have seen tractors used on highways and out of Chicago, somewhere between Joliet and Ottowa. If road equipment includes snow removal, I have already answered that question. I have not seen chains in use on tractors in any other States. A Weed chain of suitable size can be used as well as on a tractor as on a truck. I sold chains that were put to use on tractors. I took orders for chains for the jobbers. I have sold chains for use on tractors, fire apparatus, and road equipment used in the construction and maintenance of roads. Outside of the instance I have mentioned, I have seen Weed chains used on automobiles, trucks, and motorcycles for Federal, State, or Municipal governmental purposes in my territory during the taxable period. I have seen the Gov-
[fol. 253] ernment use these chains for their post office trucks in the City of Chicago and in Kansas City, also for the same purpose. I have sold chains in Denver for the use of the Department of Interior in the Bureau of Reclamation. They were used in the Forestry Division of the Department of Agriculture. I cannot give you the uses of them exactly, they were used on cars, probably in the Forestry Division, by these men who are obliged to go from place to place. That is true also for the Department of Interior. Weed chains were primarily adapted for use on automobiles. At the time when tire chains were made there probably were no tractors and no fire apparatus to use them. At the time when there were tractors and fire apparatus or road equipment, they were equally well

adapted for use on the tires of tractors, fire apparatus, or road equipment. There probably were no fire apparatus at the time Weed chains were originally designed for automobiles. My experience would say the fire apparatus came much later. When it did come they used the same type or sizes, appropriate size of Weed chains. Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus, or road equipment. Weed chains may be detached from automobile and truck tires and used on tires of the same size on tractors, fire apparatus, or road equipment without any change in the chains. The Weed chains sold by me during the taxable period in my territory for use on fire apparatus, police and road equipment, did not differ in any way from the Weed chains sold [fol. 254] and used on private automobiles and trucks. They were interchangeable. The Weed chains sold by me during the taxable period in my trade territory for use on automobiles and trucks for Federal, State, or Municipal governmental purposes, did not differ in any way from the Weed chains sold by me and used on private automobiles and trucks. They were interchangeable.

Q. Was there any peculiar characteristic about a Weed chain sold by you during the taxable period that prevented it from being sold for general use as a "Commercial Commodity"?

Mr. McMahon: The Government interposes an objection to that question for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion of the witness and assumes facts to be true which have not been shown by the evidence. We press the objection as stated.

The Court: Overruled.

Mr. McMahon: Exception.

The Witness: May I have that question please? (Question read.)

The Witness: No, sir.

Q. Was there any peculiar characteristic about the Weed chain sold by you during the taxable period which made it primarily adapted only for use as a component part of a privately owned automobile or truck?

Mr. McMahon: The Government interposes an objection [fol. 255] to the question for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion of the witness, and the evidence shows chains were primarily designed and adapted for use on automobiles and trucks prior to the advent of tractors. The Government presses the objection.

The Court: Overruled.

Mr. McMahon: Note an exception.

(Question read.)

The Witness: No.

In soliciting trade for the American Chain Company and selling these chains I dealt largely with jobbers, some dealers and some were actual users. I generally took the orders from the jobbers and would send them in to the Chicago office. I would say that most of the orders came in in that manner. Orders did not indicate where they were going to be used.

Cross-examination.

Read by Mr. McMahon:

There are no tire chains made for a one-ton Ford truck that will fit on any tractor. I told you a while ago that the chains I sold were adapted for use on trucks and tractors alike, which was a correct statement for the reason that there were no sizes given. As to interchanging larger or smaller sizes of chains used on trucks with chains used on tractors generally, if you had a truck chain of a large size, that chain could be readily put on a tractor providing that was of a similar size or of the same size. If the tractor [fol. 256] required a smaller size it might be necessary to remove part of the chain in order to make it fit. I wish it to be understood that during this taxable period I sold chains of different sizes, different tensile strength, and different weights for different uses, but want to qualify that "tensile strength" is not involved in the use of a tire chain. I know something about the duty requirements of a tractor with respect to tire chains. I cannot tell you the foot pounds necessary in a tire chain operating on a Fordson tractor on an asphalt pavement for the reason that it is an engineering question, which I cannot answer. I am

not an engineer. I am a practical man. My actual experience in the use of these chains shows you just what is necessary for consideration in the designing and building of chains. As to the duty requirements necessary in order to perfect a chain that will neither break nor be in excess to any degree of the traction power necessary to move the load without breakage, that condition would depend upon the road conditions. It would be necessary to design a chain that would take care of the peculiar road condition that you have in mind. I am not an engineer. I mean something when I say "equally adapted" that would be interchangeable. I never used the term "Commercial Commodity," it means much or it means little, it might be so many parts of steel. I do not remember Senator Long having asked me a question of that kind.

(Question read to the witness.)

[fol. 257] When asked that question I meant that it was something that was currently being sold. "Primary design" in the strictest meaning of my answer, was that the original invention of the Weed tire chain, that was the primary design. The Weed chain primarily was designed to provide anti-skid devices for automotive vehicles as near as I can remember, I cannot answer the question as to the kind of automotive vehicles because I do not remember what the designation was. The first development was the automobile as a pleasure vehicle. The original chain was designed for use on an automobile and used as such. The next stage of development was the truck. The same type of chain that was used for the automobile, was modified and used on the trucks. It was modified by weight and size both. That is not true with respect to the advent of the tractor. The truck chains that were currently used at the time of the advent of the tractor were applied to tractors. So far as I know these tire chains were primarily designed for use on the automobile pleasure car.

WILLIAM PARRISH, a witness, whose deposition was taken on behalf of plaintiff, at Chicago, Illinois, on the second day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During the years 1922, 1923 and 1924 I was directly and indirectly with the Ford Motor Company in Illinois, In-
[fol. 258] diana and Wisconsin helping liquidate the business of some of the first authorized distributors, such as the LaRue Motor Company, Chicago, Illinois and Bloomington, Illinois and formed the distributorship of the Middle-Blair Company and after that company was functioning I was with the Chicago branch. I am a sales engineer, as the term applies. During the time I was with the Ford Motor Company I was familiar with the tractors that were made by that company, that was my business. I am familiar with the publication known as the "Ford Owner and Dealer" and the "Ford Power Age." The Ford Owner and Dealer was a paper published by the Trade Press Publishing Company of Milwaukee, Wisconsin, not connected with the advertising department of Ford, but it reached all of the Ford dealers in its subscription list and a great many of the Ford owners. As the tractor business increased industrially in 1921 and 1922 they devoted quite a bit of space in their paper toward tractor items of news interest and later on published a section on different colored paper stock, which they later reprinted as the nucleus around which the separate publication of "Ford Power Age" was founded. Plaintiff's Exhibit 4 is the Ford Owner and Dealer of October, 1923, and pages 97 to 128, inclusive is the tractor part of the publication to which I referred. Pages 102 and 103 show cuts or representations of tractors and road equipment with tire chains on the wheels or tires, that is the lower picture on page 102 and the only picture on page 103 and possibly the picture on page 128. Plaintiff's Exhibit 6 is a bound copy of the
[fol. 259] Ford Power Age, a monthly publication beginning in February, 1925, through December, 1925. Page 20 of the March issue, the top picture on page 17 of the July issue, the bottom picture on page 10 of the December issue, and the top picture on page 20-B of the December issue describe or represent the same machines, the same tractors and road equipment that are described in Exhibits 4 and 5. Plaintiff's Exhibit 7 is a bound volume of twelve issues of the Ford Power Age in the January issue of which is shown

on page 10, the lower picture, a Fordson tractor with rubber tired wheels equipped with chains. Page 17 of the February issue, the top picture; page 33 of the March issue; page 6 of the April issue; page 30 of the April issue; pages 4 and 5 of the May issue; page 23 of the November issue; page 32 of the December issue contain cuts or representations describing or representing Ford tractors and other equipment that were made and sold during the taxable period July, 1922, to June, 1924, inclusive. The machines shown on those pages are typical of the machines that were made during the taxable period. Exhibit 8 is a letter from the publishers of the magazines offering to refresh my recollection and I present this as an explanation or key and testify to the truth of the statement. That is the letter I received from the publishers. Plaintiff's Exhibit 9, marked Industrial and Farm Uses of Ford Power Units is a reprint of Ford Owner and Dealer of April, 1924. Plaintiff's Exhibit 10-A and 10-B are pictures of two Wehr graders at work. Exhibts 10-A and 10-B show two Ford-
[fol. 260] son tractors with rubber tired wheels with chains on them, propelling a motor grader of the Wehr Motor Grader Company make and the letter under plaintiff's Exhibit 10-B is an explanation of the picture which was taken in the fall of 1923. I saw many machines about that time of which that one is a typical representation which were equipped the same as this machine. Plaintiff's Exhibit 34 (formrely 4 in the deposition) copy of Ford Owner and Dealer of October, 1923; Plaintiff's Exhibit 35 (formerly 5 in the deposition) copy of Ford Owner and Dealer of November, 1923; Plaintiff's Exhibit 36 (formerly 6 of the deposition) copy of Ford Power Age—February to December, inclusive, 1925; Plaintiff's Exhibit 37 (formerly 7 in the deposition) copy of Ford Power Age—twelve issues; Plaintiff's Exhibit 38 (formerly 8 in the deposition) letter from Ford dealer and service field; Plaintiff's Exhibit 39 (formerly 9 in the deposition) reprint of Ford Owner and Dealer, April, 1924; Plaintiff's Exhibit 40 (formerly 10-A and 10-B in the deposition) two photographs of Wehr graders; Plaintiff's Exhibit 41 (formerly 11 in the deposition) booklet entitled "McCormick-Deering Industrial Tractor and Operating Equipment"; Plaintiff's Exhibit 42 (formerly 12 in the deposition) booklet entitled "McCormick-Deering Industrial Tractor and Operating Equip-

ment'' as identified by the witness, offered and admitted in evidence. (Exhibit 13 of the deposition numbers was excluded by the Court as being immaterial and not within the taxable periods.)

[fol. 261] ARTHUR W. TURNER, a witness, whose deposition was taken on behalf of plaintiff at Chicago, Illinois on the 2nd day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Read by Mr. Long:

I am in the advertising department of the International Harvester Company and have been since January 1, 1927. Before that time I was assistant professor of agricultural engineering, Iowa State College from 1922 to 1924 and associate professor of agricultural engineering, Iowa State College from 1924 to 1927. The documents, Plaintiff's Exhibits 11 to 13 were taken from the files of the International Harvester Company here in Chicago. They were printed literature.

FRANK O. BLACKLEY, a witness, called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was supervisor of motor apparatus in the fire department of New Haven, Connecticut. During that time we had a fire apparatus vehicle made by the Webb Motor Fire Apparatus Company of St. Louis, Missouri, and the size of tires on that vehicle was 36 x 6. We used Weed tire chains on that [fol. 262] vehicle. In one station on Highland Street on the top of a hill when it was bad weather, icy weather, we used chains on all four wheels.

Cross-examination.

By Mr. McMahon:

This Webb Motor Fire Apparatus was an automobile chassis. It was made and assembled by Webb and was not a standard chassis of any kind.

HARRY B. PAGE, a witness, called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was chief of the Department of Fire Service at East Haven, Connecticut. During that period we had a piece of equipment with a Cadillac automobile chassis having 36 x 4½ tires. We used chains on that vehicle. The name of that vehicle was Cadillac. It was a combination hose and chemical.

Cross-examination.

By Mr. McMahon:

We did not have other motor driven vehicles in that department. No pleasure cars and no chief's car.

[fol. 263] PATRICK GALLAGHER, a witness, called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was employed by the Blue Ribbon Tire Service. My position which I have held for about eighteen years, is to apply and to replace solid tires on a particular class of trucks. That is a 40 x 5 solid tire known as a tractor tire. That tire was taken from a three and one-half ton Mack truck by myself. Sometimes the marking on those tires shows the size. On the side walls of the tire it is marked in places "tractor type." It isn't as though it could be used for that particular type alone, it may be used for any other over the road. That is any other wheel that has a 40 x 5 tire on it. This is marked "tractor type" on the tire. That truck from which that tire came was in use during 1922 to 1924. Plaintiff's Exhibit 43—solid tractors tire on rim as identified by the witness, offered and admitted in evidence.

Cross-examination.

By Mr. McMahon:

Plaintiff's Exhibit 43 has stamped on it, set out from the rubber the words "tractor type." Some tires of that size have the words stamped into the tire "truck type" and "heavy duty" and then again some of them have the words "tractor type." Plaintiff's Exhibit 43 was not used on a Mack three and one-half ton truck during the taxable period. Plaintiff's Exhibit 43 required a 40 x 5 single solid [fol. 264] chain or dual chain. I did see Exhibit 43 in use on a tractor but I have seen tires of the same type or make and size in use on a tractor. Some of those tractors were made by Ford and some were made by others. I never saw this particular type of tire marked Exhibit 43 in use on a Ford tractor. If you placed a 40 x 5 dual chain on Plaintiff's Exhibit 43 you would have to have two tires on the one wheel, that is another one of these tires. A 40 x 5 dual solid chain will not fit this one tire, Plaintiff's Exhibit 43. A 40 x 5 single solid chain will fit Plaintiff's Exhibit 43.

Redirect examination.

By Mr. Swindler:

(Witness places two chains comprising Plaintiff's Exhibit 8 on the tractor and truck tires being Plaintiff's Exhibit 15 and Plaintiff's Exhibit 43.)

Recross-examination.

By Mr. McMahon:

To my mind it is necessary that Plaintiff's Exhibit 8 have three idle links and possible room for securing another idle link providing one is available and that the rim chain which extends around the circumference of the wheel comes below the steel rim of the wheel to which the rubber is fastened because it has got to come below the tire rim and the wheel in order to stay and take hold. If the side chain or rim chain of Plaintiff's Exhibit 8 extended down to the top of the steel rim to which the rubber is fastened, I don't think [fol. 265] it would hold that chain on that tire. It would have a tendency to roll off because it won't have overhang enough on the wheel. It has about three or four inches

overhang over the top of the solid rubber but with the traction on the tire not connected with the road that wouldn't have enough support in that angle to hold it on the wheel. I have seen a chain similar to Plaintiff's Exhibit 8 on an inflated pneumatic tire. It has got to be loose on the pneumatic tire for the simple reason that if you get it right on the pneumatic tire inflated, probably to 50 pounds in the high pressure or about 30 to 35 pounds in the low pressure type it creates hard riding and at the same time it has got a tendency to cut into the rubber of your tire if it is too tight. If you applied a 40 x 5 chain to the ordinary pneumatic 40 x 5 tire you would not necessarily have the three extra links available. As a tire wears down you have got to adjust them links accordingly. Plaintiff's Exhibit 43 was much higher with rubber than it is now. They vary from year to year in the height of the tire. Plaintiff's Exhibit 43 could possibly be about 5/16 of an inch higher, that is more rubber on it. With 5/16 of an inch more rubber on Plaintiff's Exhibit 3 it is possible you would still have these three loose links hang on this chain but as a rule we tie those links back. Those three links did not have any use in connection with that chain on that particular tire, but if at any time that tire should be replaced by another tire of a higher type those extra links would make up the difference without having to buy a new chain. So far as this particular tire is concerned, Plaintiff's Exhibit 43, you [fol. 266] could cut these three links off each side of the chain and still use the chain on this tire but to my mind it would not be good policy because you might want to use that chain on some other tire that would have a higher profile. Plaintiff's Exhibit 15 on which you have placed a 40 x 5 chain (Plaintiff's Exhibit 8) contains three extra links and the same thing applies to this exhibit that applied to Plaintiff's Exhibit 43 but I would not recommend cutting the three extra links off because you might want to use the chain on another tire. It could be done but not to good advantage. So far as Plaintiff's Exhibit 15 is concerned, you do not need those three links in order to use that chain on Plaintiff's Exhibit 15. This 40 x 5 chain fits Plaintiff's Exhibit 15 tighter than the 40 x 5 chain fits Plaintiff's Exhibit 43. Plaintiff's Exhibit 15 has a wider crown than Plaintiff's Exhibit 43. The chain on Plaintiff's Exhibit 15 is tighter than the chain on Plaintiff's Exhibit 43. I account

for the difference of fit between Plaintiff's Exhibit 15 and 43 because there is hardly any two tires of different makes that are the same in width, in cross sections or in height.

Redirect examination.

By Mr. Swindler:

It is just as easy to put these chains on a truck as it is on the rim of these wheels in the Courtroom. I am able to put them on a truck or tractor and get them as tight as they are here if I was applying the chain myself. If I had it to do myself I would put it on as tight as I wanted it or as loose [fol. 267] as I wanted it. As near as I know the three extra links on the side chains of each of these exhibits have been used to take care of the different sizes, height and profile of the tires of different manufacturers. The difference in looseness between the chain on Plaintiff's Exhibit 43 and Plaintiff's Exhibit 15 is due to the different make and a different crowned tire.

Recross-examination.

By Mr. McMahon:

I could not say as a matter of fact that a tire with a narrow tread does not require as wide a chain as a tire with a wide tread. That would be entirely up to the manufacturer.

William F. Cotter, a witness, recalled by plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

I understand what is meant by the taxable period from my testimony. A 32 x 4 tire chain will fit a 32 x 3½ tire. That size is interchangeable and was during the taxable period. During the taxable period I recall that we had 48 each special sizes that were termed interchangeable sizes. Those sizes would fit a tire other than those of a size marked on the chain just as well as it would fit a tire of the particular size marked. In fact I had a list that I used

during that time with our distributors and would trade in a [fo.l 268] general way. I used it at jobbers sales meetings as a manner of safeguard for the jobbers' interest as well as our own in pointing out the interchangeability of certain sizes of Weed tire chains. By interchangeable I mean in an emergency should their stocks be extinct of any given size or sizes, they were free to draw from these interchangeable sizes to take care of any conditions that they met and by an emergency I mean during a snow or ice or sleet condition when the demand for tire chains is tremendous and everybody wants equipment, so that the interchangeable sizes particularly were a safeguard during the tag end of the season and helped the merchants unload stocks preparatory for another season and on every occasion I personally tried on a number. I have seen in jobbers' stockrooms a list of Weed tire chains along with the interchangeable sizes. I could illustrate that by referring to Plaintiff's Exhibit 43. We will assume the size 32 x 3½. I haven't a list of specifications outside of that one size with me but the same principle applies to all of the so-called interchangeable sizes. It was the policy of our company to supply the district men with a complete outline of specifications to which they could refer and inform their trade as regards the interchangeability of any size. Taking a 32 x 3½. In the specifications of that size the side chains would be 91⅝ inches long. The side chains are the chains to which the cross chains are connected. That is always known as the side or rear chain. The cross chains are connected to the side chains on that given size would [fol. 269] measure 7¾ inches long. Assuming that a cross chain was one inch longer, that, of course, would carry accordingly throughout the chain entirely. That would simply bring our side chain down one-half inch here and up one half inch here, all around. That would shorten your cross chain but would have no interference on the performance of the chain after it is harnessed to the tire. As to making the chain fit more loosely on the tire there is always a tolerance when you are using a metal of this kind that you would have to allow for. For example there is a condition in tire chains absolutely beyond our control and I know our company has experimented in testing for years. It has always had a certain amount of stretch in tire chains. For example after travelling we will say 40 or 50 miles if

the owner is not familiar with putting on tire chains as tight as he should there is all the more tendency for that tire chain to stretch one link in that 50 miles of travel so we have always considered that it is an asset to have one or two extra links on a tire chain that takes care of the vehicle or tire when it is new and if it is superfluous on the tire chain it simply can be clipped off with a pair of pliers. I was instrumental in procuring our company to develop our "sturdy pliers" to sell to the consumer to take care of any condition that was not cared for in the tire chains after they were in use 100 or 200 miles.

Our engineers would probably be delegated to Akron, Detroit or New York, or some other point to locate a new tire, say 34 x 4. The market had been ransacked to find the largest given tire of any size. A tire chain is made to [fol. 270] fit that size. I mean to fit that largest size, the largest size produced. To avoid penalizing the trade by requiring them to carry a multitude of sizes, our company's policy has always been to take the largest size tire, make the tire chain to fit that largest size tire on the market so that if it fitted the largest size tire it would take care of anything in that range. That is the reason there are two or three extra links on each chain. It is a fact that there are two or three extra links on the average tire chain on account of different tires being made in different molds. These interchangeable sizes that I speak about because the side chains on the wider and larger sizes would be lower, it just simply travels lower than the standard size and the cross chains would be longer. The function or performance of a tire chain is to creep around the tire so as not to be injurious. If that chain, for example, was anchored there, eventually the rubber would be gouged out for four inches. I have seen that and recommended to fire departments and others to get away from the real tight chain for any duration of travel. The following sizes are interchangeable: 28 x 3½, 35 x 4, 38 x 5, 32 x 3½, 36 x 4, 33 x 5½, 33 x 3½, 36 x 4½, 37 x 5½, 30 x 4, 37 x 4½, 35 x 6, 34 x 4, 36 x 5 and 30 x 5 are all interchangeable with some other size. Regular Weed chains 32 x 3½ uses 32 x 4, 33 x 3½ uses 32 x 4 or 32 x 4½. By uses I mean that size tire will use those size of chains. If a 33 x 3½ isn't available the other size may be substituted for that. A 30 x 4 uses 29 x 4½, 34 x 4 uses 35 x 4 or 33 x 4½, 35 x 4 uses 34 x 4½ or

33 x 5, 36 x 4 uses 35 x 4½ or 34 x 5, 36 x 4½ uses 35 x 5, 37 x 4½ uses 36 x 5 or 37 x 5, 36 x 5 uses 37 x 5, [fol. 271] 36 x 5 uses 37 x 5; 33 x 5½ uses 34 x 5, 35 x 5½ uses 35 x 5, 37 x 5½ uses 38 x 5. Those are the interchangeable sizes in the regular Weed chains which I mentioned. With respect to dual solid chain sizes, we have 34 x 7, 34 x 4, 38 x 6, 32 x 4, 34 x 5, 34 x 3½ 40 x 4 and 37 x 4. The interchangeable sizes with the sizes I have just given are: 34 x 7 uses 36 x 6, 38 x 6 uses 40 x 7, 40 x 4 uses 38 x 4½, 37 x 4 uses 38 x 4 or 38 x 3½, 34 x 4 uses 36 x 3½ or 34 x 4½, 32 x 4 uses 34 x 3½ or 32 x 4½, 34 x 3½ uses 32 x 4 or 32 x 4½. With respect to pneumatic tire chains we have the following sizes: 35 x 4, 35 x 6, 33 x 4½, 37 x 6, 34 x 4½, 37 x 6, 34 x 4½, 39 x 7, 37 x 5, 40 x 7, 32 x 6, 44 x 10 and the sizes interchangeable with those sizes are: Single pneumatic truck chains 35 x 4 uses 34 x 5, 33 x 4½ uses 34 x 5, 37 x 5 uses 36 x 6, 32 x 6 uses 33 x 5, 35 x 6 uses 36 x 5, 37 x 6 uses 38 x 5, 39 x 7 uses 38 x 8. With respect to single solid tire chains we have sizes 32 x 3, 34 x 4, 35 x 6, 34 x 3½, 35 x 4, 34 x 7, 32 x 3½, 36 x 4½, 34 x 8, 34 x 3½, 34 x 5, 40 x 9, 32 x 4, 37 x 5, 32 x 10. The sizes that are interchangeable with those sizes are: 32 x 3 uses 32 x 3½, 32 x 3½ uses 30 x 4, 34 x 4 uses 36 x 3½, 36 x 4½ uses 36 x 5, 37 x 5 uses 36 x 6, 35 x 6 uses 36 x 6 or 36 x 5, 34 x 7 uses 36 x 7 or 36 x 6 and 34 x 8 uses 36 x 7. What I mean by the word "use" in that particular sense is interchangeable or substitution or that it might be used satisfactorily instead of the other size.

Q. Were such sizes as you have testified to commonly used interchangeably for the sizes you have stated?

[fol. 272] Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness and the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, incompetent and not the best evidence and usurps the power of the jury.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. They were.

The Court: I understand you are speaking of the taxable period?

A. Yes, your Honor.

Cross-examination.

By Mr. McMahon:

Q. You are a salesman for the American Chain Company?
A. Yes, sir.

HARRY O. MAINZINGER, a witness, whose deposition was taken on behalf of plaintiff, at Detroit, Michigan, on the third day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During the taxable period July, 1922, to June, 1924, inclusive, I was sales manager of the Whitehead and Kales [fol. 273] Company, builders of tractor wheels, both agricultural and industrial wheels. We did not build tractors. We used the Fordson tractors and built wheels for the Fordson tractors. During the taxable period we bought and sold Weed chains. Our dealers were the Ford dealers and we sold the chains with our wheels to our dealers and the distributors throughout the United States for use on our tractor wheels. We started our business early in 1921 and continued the business up to March 1, 1930. I spent about half my time traveling throughout the United States regularly, visiting distributors and going out on demonstrations to see the tractors work. I have seen Weed chains used on tractors and road equipment in Illinois, Ohio, Michigan, New York, Pennsylvania, New Jersey, Texas, Missouri, Kansas, Iowa, Minnesota, Wisconsin and Colorado, in demonstration work and actual use. We did not make the tires for our wheels. We just made the wheels and bought the tires and chains.

Q. Can a Weed chain of suitable size be used just as well on a tractor as on a truck?

Mr. McMahon: The Government objects to that question for the reason no proper foundation has been laid, the witness is not qualified to answer and it assumes facts to be true which are not shown by the evidence. The Government presses the objection.

The Court: Overruled.

A. Yes, sir.

[fol. 274] We sold or used on the tractors Weed chains designated as 40 x 5 solid and 40 x 5 dual solid. I have seen Weed chains used on trucks for federal, state or municipal governmental purposes.

Q. Have Weed chains for use on trucks any peculiar characteristics with respect to general design, which are not identical with Weed chains for use on tractors?

Mr. McMahon: The Government objects to that question for the reason no proper foundation has been laid, the witness has not shown himself qualified to answer, it calls for the conclusion of the witness. It assumes facts to be true which have not been shown by the evidence. We press the objection.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. No.

Weed chains may be detached from truck tires and used on tires of the same size on tractors or road equipment without any change in the chains. Weed chains sold during the taxable period in our territory for use on tractors and road equipment did not differ in any way from Weed chains sold and used on private trucks. They were interchangeable Weed chains sold during the taxable period in our territory for use on trucks for federal, state or municipal governmental purposes did not differ in any way from Weed chains sold and used on private trucks.

Q. Was there any peculiar characteristic about Weed [fol. 275] chains sold during the taxable period that made them ordinarily unsuitable for sale and general use as a commercial commodity.

Mr. McMahon: The Government interposes an objection to that question for the reason no proper foundation has been laid. The witness has not shown himself qualified to answer, it calls for the conclusion of the witness and as-

sumes facts to be true which have not been shown by the evidence. The Government presses the objection.

The Court: Overruled.

Mr. McMahon: Note our exception.

A. No.

Page 15 of Plaintiff's Exhibit 1 is a little catalogue we got out when we first started to build this equipment in 1921 and I would say it was printed before the taxable period, but used during the taxable period. Plaintiff's Exhibit 44—Whitehead & Kale Catalogue (formerly Plaintiff's Exhibit 1) offered and admitted in evidence. Page 15 of Plaintiff's Exhibit 44 shows a dual rubber tire wheel and a method by which it is attached to the original single wheel. It also shows an extension rim, which in the early stages we used to build. The theory was that the cleats on the rim being about one inch below the rubber when the tractor sunk into the earth, and the going was soft, that cleat would then come into play and give traction. Practically, it did not work simply because the cleat kicked out the loose dirt from under it and the wheel would not sink in far enough to give you real traction. That was called a wheel with an extension weight and extension rim. When [fol. 276] we found we did not get sufficient traction, we tried to work out a scheme of putting a chain on the wheel, but the extension rim on the outside did not permit the side chains of the chain to drop down low enough so we could take up the slack and keep the chain tight, as was the case on the inside of the wheel. Therefore we had to make the side chains on the outside longer than we did on the inside. There was probably a difference of around six inches in the side chains. There was not much production of that peculiar type of wheel and not to exceed 50 sets of chains were made that way. The use of that wheel was shortly abandoned. Plaintiff's Exhibit 2 is a photograph we had taken for advertising purposes at the Michigan Central Railroad Yard on Livernois Avenue, in Detroit, about 1923 or 1924. It represents a Fordson tractor with Whitehead & Kales wheels, Weed chains and Whitehead & Kales trailers. Plaintiff's Exhibit 45 (formerly Plaintiff's Exhibit 2)—photograph of Fordson tractor offered and admitted in evidence. Plaintiff's Exhibit 46 (formerly Plaintiff's Exhibit 3)—photograph of Fordson tractor with

Whitehead & Kales wheels, taken at Wayside Inn, north of Boston, especially page 15, offered and admitted in evidence. The photograph shows a Fordson tractor with Whitehead & Kales wheels, 40 x 5 dual tires and Weed chains.

Cross-examination.

Read by Mr. McMahon:

By equally adapted I mean the chain in this particular case is adapted as well to a wheel on a tractor as it is on a [fol. 277] truck, so long as the tire sizes are the same, that is I mean it will work as well on a tractor as on a truck. By "equally adapted" I mean a chain can be used on a truck or used on a tractor providing the tire size requirements are the same. By commercial commodity I mean an item which is generally used about an automobile or a truck. It might be a wrench, or an automobile jack. It may be any tool or contrivance used on or in conjunction with cars or tractors. I would say chains in this case would be a commodity. By commercial commodity I mean something that is bartered and sold regardless of the specific articles. That table if bartered and sold would be a commercial commodity. Tire chains for use on our Fordson wheels were interchangeable for use on truck wheels. We did not have to do anything with them in order to use them on the truck wheels if the tire size is the same. The chain required for the special Fordson tractor wheel, that is the chain requiring a side chain 6 or 8 inches longer on the one side than on the other, was not interchangeable for use on truck tires. Only a limited number of those chains were made, approximately 50 in all. Upon elimination of the extension rim the wheel required a standard chain. There were only two sizes of those, that was a chain for a 40 x 5 single solid tire and a chain for a 40 x 5 dual solid tire. Those chains were equally adaptable for use on a truck or tractor. That is not true with respect to tractors having steel wheels because no chain is required. It has a cleat or grouser on the wheel rim. Those are commonly [fol. 278] referred to as mud lugs. A chain adaptable for use on a truck is not adaptable for use on a tractor having steel wheels. There would be no use for a chain on such wheels and I only wish it understood that interchangeable

chains apply only to wheels having rubber tires. I do not know which was first in the point of time, the advent of the automobiles or the advent of the tractor. I do not know which was first in the point of time, the advent of the truck or the advent of the tractor. I would not say there were more tractors in operation during 1922, 1923 and 1924, than there were automobiles and trucks, there were many more automobiles and trucks in use during those years than there were tractors. I examined the Weed chains closely which I indicated were used on governmental, state and municipal vehicles to the point of handling them, putting them on and driving them. I have not handled them in all cases that I testified I have seen. I could not say that my company sold all of the chains in our territory during 1922, 1923 and 1924, as chains could be bought from the many jobbers and distributing points and it is impossible when you see a tractor operating with chains on it to determine from whom the chains were purchased. We sold Weed chains along with the tractor equipment through our jobbing and dealer set-up, but illustrated or listed them as separate items so they could order with or without chains as they might prefer, if they prefer, chains went along as part of the original equipment. I would say that automobiles and trucks during the years 1922, 1923 and 1924 used more chains than tractors did.

[fol. 279] Q. As a matter of fact, is not the chief use of chains on or in connection with automobiles and trucks?

Mr. Long: Plaintiff objects to that question because it calls for an irrelevant, incompetent and immaterial answer, seeking to show the chief use of these chains. We press the objection.

The Court: Sustained.

Mr. McMahon: Note an exception.

I am unable to answer whether or not a Fordson tractor requires a heavier chain or a chain possessing greater tensile strength than is required by the ordinary Ford roadster. My company during the years 1922, 1923 and 1924 did not sell different sizes of chains for different uses. There is a difference in the size between a 40 x 5 solid and a 40 x 5 dual. The difference is in the length of the cross links. We sold a chain for a 40 x 5 solid single and a 40 x 5 dual. The cross links on the dual are longer than on the single. The

weight of the dual is heavier but the material is of the same weight. It is heavier by vitrue of the fact that the cross links are longer. We did not sell chains for federal, state or municipal governmental purposes in the absence of a sale of a tractor.

Redirect examination.

Read by Mr. Long:

I have seen chains in use on tractors doing road grading work, road maintenance work, snow removal work and general road repair. I have seen Fordson tractors so equipped [fol. 280] with chains in the different states I mentioned in my previous testimony. I do not recall that I have seen Fordson tractors equipped with chains during the taxable period that were doing excavation work.

Recross-examination.

Read by Mr. McMahon:

During 1922 on some work Fordson tractors required chains every day with the tractor work. They require chains when they would work on road sides, plowing dirt for road grading work. Chains were used in 95% of the cases. I am not in a position to tell the number of days in the year that the tractor was doing road grading work. As a general thing chains are used only in inclement weather, when the ground is rendered soft by the weather and remains soft by reason of the action of the elements, that is where the dirt is loose, so that the tire would not get traction. Outside of the specific grading uses where special traction is necessary, chains are hardly if ever used on Fordson tractors during favorable weather and the use of chains on tractors outside of the specific instances, is limited. That was true in 1922, 1923 and 1924. My company did not sell all of the tire chains used on Fordson tractors throughout the United States during 1922, 1923 and 1924. Our sales of chains were chiefly made as part of the original equipment, dependent upon the wishes of the customer.

[fol. 281] Walter M. Cusack, a witness, whose deposition was taken on behalf of plaintiff, at Cincinnati, Ohio, on the

fourth day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, I was employed as a salesman by the American Chain Company with headquarters in Cleveland, Ohio. During that period I both sold and used Weed chains. When I was travelling through the south, I used Weed chains almost continuously during 1922 and 1923 because there were very few roads that you did not need chains on during that time. At that time I travelled in the states of Virginia, North Carolina, South Carolina, Alabama, Tennessee, Louisiana, Oklahoma and part of Texas. During that period I have seen tire chains used at a great many points in this country and saw them on practically every piece of rolling equipment that was equipped with automobile tires whether it be motorcycle, truck, automobile, taxicab, buses, tractors or road equipment. By automobile tires I mean rubber tires. I have seen Weed chains used on tractors, fire apparatus and road equipment during the taxable period. It is a common occurrence in the south to see tractors sitting on the side of the road, equipped with chains waiting to pull someone out of the mud. I have been pulled out of the mud many times by such tractors during the taxable periods.

Q. Can a Weed chain of suitable size be used just as well [fol. 282] on a tractor as on a truck, provided the tractor has rubber tires?

Mr. McMahon: The Government interposes an objection for the reason that it calls for the conclusion of the witness, the witness is not shown to be qualified to answer, and it assumes facts to be true not shown by the evidence. The Government presses the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. Yes.

I have seen Weed chains used on tractors at various points in the south, in lumber camps and on road scrapers at different places. Weed chains were used on tractors in the construction of roads, I would say more in the main-

tenance of roads pulling a plow to level the gravel or shale roads. At times I have seen those tractors equipped with Weed chains. I sold chains largely through jobbers. The sizes were of a very wide range, running from chains for passenger cars, 30 x 3 in that period, up to 44 x 10 which was not a popular size. The popular sizes on tractors were 40 x 5, 40 x 7, 40 x 8 and 40 x 10, both single and dual. Those same sizes of Weed chains were also used on trucks that I have seen in my territory during the taxable period. I have seen Weed chains used on fire apparatus in the city of Cincinnati, and I have seen them used in Louisville and Pittsburgh. I have undoubtedly sold chains for such use [fol. 283] through the jobbing trade. My sales are with the jobber. The 40 x 8 was a rather popular size on fire equipment. That particular size I believe was used more on what they call light pumpers with solid tire. There was some 40 x 6 equipment and I am certain 34 x 6 was a size that was used on the pumpers, hose reels, hook and ladders, and maybe the supply wagon. Similar sizes were also used on that equipment such as 33 x 5, 34 x 5 and 35 x 5. Those were used on the smaller light type such as supply wagons and in the smaller communities on smaller fire fighting equipment. I would say the fire departments were liable to use any size tire chain we make that would fit small roadsters up to the highest class cars, such as the chief of a fire department would use. I have seen Weed chains used on post-office trucks, for state road equipment, and municipal fire and police cars. Weed chains used on automobiles or trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus or road equipment. Weed chains may be detached from automobile or truck tires and used on tractors, fire apparatus and road equipment with the same size tires, without any change in the chains. Weed chains manufactured and sold by the American Chain Company, in which the taxes in these suits were paid, were interchangeable for use on tractors, fire apparatus and road equipment, providing the sizes were comparable. Weed chains sold during the taxable period in my territory for use on fire apparatus, police and road equipment did not differ in any way from Weed chains sold and used on pri- [fol. 284] vate automobiles and trucks. They were interchangeable on comparable sizes of tires. Weed chains sold

during the taxable year in my territory for use on automobile- or trucks for federal, state or municipal governmental purposes did not differ in any way from Weed chains sold or used on private automobiles and trucks, the sizes being comparable. They were interchangeable with like sizes. There were no peculiar characteristics about Weed chains sold during the taxable period in my territory which ordinarily made them unsuitable for sale and general use as a commercial commodity. I know of Weed chains for use on tractors that were reinforced by additional cross chains. Such chains when reinforced with cross chains were also used on trucks.

Cross-examination.

Read by Mr. McMahon:

By equally adaptable I mean that the chain could be taken off of one tire of corresponding size and put on another tire and of the same size provided they were both rubber tires. By primarily adapted I mean the chain can be used, interchangeable for use generally, that there had to be no basic change in the construction to switch from one piece of equipment to another of corresponding tire size. By primarily adapted, equally adapted, I mean where comparable sizes of tires are in use that the chains may be interchanged. By commercial commodity, I mean something that can be sold out over a counter or store, that is something that is bartered and sold. I do not know how many chains the American Chain Company paid tax on. [fol. 285] I did not pay the tax and was not present when the tax was paid. I do not know anything about the actual payment of tax between the American Chain Company and the Collector of Internal Revenue as to details. Throughout all of my territory comprising practically the central and southern parts of the United States I have seen chains used on automobiles and trucks more frequently than I did on tractors for the simple reason there were so many more automobiles and trucks running than tractors. The advent of the automobile is first in the point of time. The advent of the truck as compared to the advent of the internal combustion tractor was first. I judge the tractors were later. Automobiles and trucks were using tire chains prior to the advent of the internal combustion tractor. I

would not say that upon the advent of the tractor they applied the tire chain that was formerly used on trucks and automobiles to the tractor. The tractor did not require a heavier chain, I would say they used the same chain for that size wheel. We did not put the chain on the tractor during the period we are speaking of. The wheel to carry a rubber tire was made special, that is, the tractor came equipped with different type wheels. A certain company made them up to carry a wheel that would become part and parcel of the tractor and our chains simply went on that wheel. They were chains that we formerly used for automobiles and trucks and it sold during that period for automobiles and trucks. We sold those chains for use on these tractors when the tractor came [fol. 286] into existence. Not all tractors have rubber tires. They have steel wheels or the caterpillar type of tractor. There are cleats on the steel wheels to keep them from slipping. They all used cleats to describe the general coverage. You do not ordinarily use chains on a steel wheel and all of my testimony is based on wheels having either solid or pneumatic rubber tires. Balloon or semi-balloon tires were not in existence in 1922, 1923 and 1924. It seems to me it was a later date that the balloon tires first came out. I cannot answer how many chains were sold to the post-office department in my territory during 1922, 1923 and 1924. The jobber sells the department. I never sold direct to municipal or state highway commission. I sold the jobber and the jobber in turn sold the highway commission of the state.

Redirect examination.

Read by Mr. Long:

I do not know of any extension tire that was used in my territory. One company put out as an experiment what they called an extension rim wheel that had a small extension rim on every wheel. That company was Whitehead and Kales Company of Detroit. I only saw one of those. The American Chain Company made a chain especially for use on those wheels. We had to make the side chains that went on the outside a few links longer to take care of that extension rim. We called that a special. Very few of those were sold. That wheel was discontinued and with the dis-

continuance of the wheel there was a discontinuance of the [fol. 287] chain made to fit it. I have seen the list of the company covering the taxes paid during this period in which they ask for a refund that was made to the Bureau of Internal Revenue and I am basing my statement that the taxes were paid on that list.

HARRY SEIDENSPINNER, a witness, whose deposition was taken on behalf of plaintiff, at Cincinnati, Ohio, on the 4th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, I was assistant Superintendent of Equipment for the Cincinnati Fire Department. My duties are supervision of fire hydrants for the Cincinnati Fire Department, which has been my position for the past fourteen years. By equipment, I mean the fire apparatus in the Fire Department. As a part of my duties it was necessary to see that the fire equipment was in proper repair. During that time we used Weed chains on that equipment. I had nothing to do with the purchasing of them. All I had to do was with their use in inclement weather, or rather in the winter time during snow and ice and sometimes we put them on during heavy rains when the streets were slippery. I could not tell the exact sizes of chains offhand because we changed from solids to pneumatics after they developed the pneumatic tire. During the [fol. 288] taxable period we used pneumatics on some of the lighter apparatus and all of the big stuff, the pumpers, ladder trucks and water towers came through with solids. We used Weed chains on practically all of the equipment including roadsters, officers' cars, marshals' cars and the cars used by fire alarm telegraph service in going around the city to make repairs. We also used them on the lighter equipment called Booster, which is a combination of a hose wagon carrying a small pump in the front which we used in suburban territory. The heavier equipment that we termed our pumpers, hose wagon and pumping engine combined,

service truck, ladder wagon which does not carry an aerial ladder, aerial ladder wagons and on water towers we used Weed chains. The water tower is a special tool to be elevated in the air to put water on a higher floor than we can reach from the street level in a larger stream. That vehicle is a tractor-drawn piece of apparatus, similar to a tractor, having six wheels. We used during that period skid chains on the two rear tractor wheels, but nothing on the others. We have two trucks that we call supply trucks that deliver supplies from house to house, then we have little trucks which we call repair trucks. They were Fords that had a half-ton body on them. We used Weed chains on the rear wheels to get tractive power. The sizes of chains we have in stock now are similar to those we had during the taxable period. We had a 40 x 8, 38 x 7, and we used to take a chain if it was large, that was bought for one size of the small stuff, and we would add lengths to it to make it [fol. 289] longer, or we would take off a few lengths to make it fit a smaller wheel. We didn't carry such a supply on hand. We run our stock on an economical principle. I would have to get our records to see what size chains we carry in stock. We have been changing cars right along and changing tires and we would change these chains, as I told you before, either add lengths to the side chain or shorten it. During the taxable period I saw chains on private trucks and automobiles here in the city which were similar in appearance to the chains we were using on our fire equipment. We did not use chains every day and used them only when the weather conditions demanded. We had a code signal in the Fire Department, or code system, so that whenever we deemed it necessary for the safety of the apparatus to supply chains, if the superintendent of equipment or any of us assistants noticed from our observation while driving through the city streets that they were getting slippery or were in a slippery condition, we would notify the fire tower operator to send out the signal to drive carefully, slippery streets, and he would code that signal 3-6, and the men in the engine houses would observe that signal as it came over the tape and they would immediately apply the chains to the tires. That was the rule of the Fire Department and was during that period and still is. Oftentimes the signal would not go out. The men would apply the chains from their own observations without the signal.

It was only through riding in different parts of the city [fol. 290] that would be discovered. Like I would get out in the morning and the flushers would be out the night before flushing and the streets would be kind of frosty or there was a film of ice on the streets which this company had no opportunity to observe, we would signal out for that reason. During the taxable period in my official business I have driven a car that was equipped with Weed chains.

Cross-examination.

Read by Mr. McMahon:

In 1922 I drove a Nyberg and Buick. Those were passenger cars, roadsters. The water tower was pulled about the city by an ordinary internal combustion tractor which could be uncoupled from the tower apparatus and moved away. The ladder wagons are all pulled by tractors but not the pumpers. You could uncouple the tractor from the wagons and let them set provided you put jacks under the ladder wagons to hold them up. The pumpers were part of a truck rather than a tractor. Based upon my experience, I would say that the use of chains on fire apparatus throughout the years 1922, 1923 and 1924 was limited as compared to the use of chains on privately owned automobiles and trucks.

[fol. 291] HOWARD M. SINES, a witness, whose deposition was taken on behalf of plaintiff, at Cincinnati, Ohio, on the 4th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922, to June, 1924, inclusive, I was the distributor of automotive equipment and supplies. I am familiar with Weed chains which is one of the articles that we sold in our business. We were jobbers and engaged in that business in the taxable period in Cincinnati. We sold Weed chains during that period and kept them in stock also. We carried practically all sizes from 30 x 3½ up to 42 x 10 and those sizes were used on any sort of a motor-powered vehicle having rubber tires such as automobiles, trucks and

tractors. During that period we furnished quotations to the municipalities on tires, also bids on tire chains upon request. The municipalities would ask for bids on tire chains and as a rule they specified so many sets of Weed chains. I think they said 1,000 sets more or less of Weed chains or equal. During that period there was not on the market and we did not handle any other tire chains than Weed chains. At the present time there are other chains on the market but during the taxable period there was not any other tire chains on the market, to my knowledge. I responded to those bids and quoted prices on the different bids asking us to furnish the list price on all sizes and the name or discount so they could arrive at a net price for [fol. 292] any size which they wished to purchase. In some instances we got the business as a result of that notice. During that period we sold to the municipality different sizes of Weed chains. A person coming into our place of business would just ask for the sizes of Weed chains and we would furnish those sizes. Some fellows would ask for Weed chains for trucks. If they knew what size they wanted they would come in and ask for any size that happened to fit their wheel but sometimes they would state that they wanted them for trucks, certain sizes to use on trucks. If it was for a truck, they would ask for a truck chain. A truck chain and a tractor chain would be the same. A request for a tractor chain and another request for a truck chain, both requests would be supplied from what we termed our truck line of chain. That is what we would sell a man asking for a tractor chain. For instance, if he would ask for a 42 x 9 tractor chain we would sell him a 42 x 9, what we term truck chain, they could be used in that way. During the taxable period I saw the use of Weed chains on fire apparatus here in the city, but I can't remember having noticed any being used on tractors. Prior to that period I saw Weed chains used on ice sleds, but during that period I did not see Weed chains used on ice sleds or anything of that kind. It was possibly four years prior to the taxable period. I saw them at Columbus, Ohio.

Cross-examination.

Read by Mr. McMahon:

If a person came in and asked for a pair of chains for a Ford automobile during 1922, 1923 and 1924 we would give

[fol. 293] him a pair of 30 x 3½ Weed chains, and if he asked for a chain to fit his Buick, I don't remember the size they used at that time, but I would give him Weed chains. If he asked for a Buick, Lincoln, Cadillac, I knew the size he wanted and would give him a size and type of chain to fit that car. If we did not know the size we would go out and look at the car. During the taxable period we did not have a list of sizes, but in the last few years tire companies have prepared such lists. We sold a lot of chains in this territory in 1922, 1923 and 1924 for use on automobiles and trucks owned by private individuals, companies, corporations, etc. As a matter of fact, the big bulk of our sales was for automobile and truck use.

HENRY SCHNEEMAN, a witness, whose deposition was taken on behalf of plaintiff, at Cincinnati, Ohio, on the 4th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, inclusive, I was fire engineer for the Concinnati Fire Department and have been in that position since 1918. My duties were to look over the apparatus when it came in and see that all equipment is with the apparatus, that's counting everything I have in this book. A set of skid chains came with the apparatus which [fol. 294] we still have at present. Those chains were Weed chains. When the streets become slippery in Cincinnati we have a signal 3-6 for every piece of fire apparatus, meaning, put on Weed tire chains. We have a man who stands watch from nine o'clock at night until a quarter past six in the morning. If that signal comes in over our ticker he gets the engineer or driver of the truck down and in turn they take one or two other men to put on the chains. Lots of times we put them on three times a day. They are put on rubber tire wheels with 110 pounds of pressure. We put Weed chains on the combination hose and pumper. That pumper is in fact a four wheeled truck. We also have a service truck with a tractor in front that has six wheels on it. That is what we call a service truck. We put Weed chains on that

truck and did during this period. We have no other vehicles in our house there outside of those two. I know of other equipment in the Fire Department using Weed chains, such as touring cars, like Harry says, it is a roadster for the Marshal's use. Outside of my department I have noticed Weed chains used on the patrol wagon in Cincinnati in the Police Department. I have not seen Weed chains used on tractors in the country. We used Weed chains from the time we got a heavy frost until there was no more frost, say, the latter part of October to March and even April when we had some hard rains. We have awful hills to go up and down and if they have bad weather up on the hill from the 24's, they will call us up or we call them and ask "How's the streets up there" and they will say "pretty bad." Then [fol. 295] we don't wait for the 3-6 signal. We put the chains on ourselves without asking any questions for the reason that if we ruin any apparatus that house is responsible for it. In the downtown district it doesn't take long before the ice is all gone but on the wide hills it is too hilly and slippery and we took no chances. We never used those chains after heavy rains in the summer during 1922 and 1923. We had pneumatic tires on the 750 gallon pumper and the 1,000 gallon had solid tires which were rather slippery. The Police Department were using chains which I imagine were the same as we used because the City generally buys them in bulk and distributes them to the Fire Department and Police Department. We used the pumper during 1922 and 1923 with Weed chains on the wheels.

Cross-examination.

Read by Mr. McMahon:

As a matter of fact the only time we used chains in connection with our fire equipment during 1922, 1923, and 1924 was inclement weather, that is, when the weather conditions required their use we used them. As a matter of fact we used our equipment the greatest part of the time without chains in dry weather.

Redirect examination.

Read by Mr. Long:

There wasn't very much dry weather from October to the first of April.

Recross-examination.

Read by Mr. McMahon:

During the taxable period we used those chains every day from the first of November to the first of April if the [fol. 296] weather was had but I couldn't say if it was bad every day in 1922, 1923, and 1924. We used them the majority of times in each of those years, that is, the majority of times we had bad weather. We did not use them every day.

Redirect examination.

Read by Mr. Long:

We had bad weather the majority of times during those months.

JOHN P. EWALD, a witness, whose deposition was taken on behalf of plaintiff, at Louisville, Kentucky, on the 5th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, I was Master Mechanic for the Louisville Fire Department and have been since 1917. My duties were overseeing repairs of apparatus for the Fire Department and keeping them in proper condition to fight fire. I know all and have seen Weed chains during the taxable period. I had them placed on the rear wheels of the different pieces of apparatus to keep them from skidding. We used them on the pumper mounted on a regular motor vehicle. Some of them had pneumatic tires and some solid tires on which we used chains in bad weather, such as

[fol. 297] snowy weather or sleety weather. We also used chains on a Fordson tractor used in pulling an old style fire engine. We used them on hook and ladder, not on aerial trucks. We got that Fordson tractor during the taxable period. Plaintiff's Exhibit 1 is a true representation of the tractor that we used during that period. We still have that tractor in our Department, having made some changes like putting a windlass on it. We used Weed chains on the tires of that particular tractor during the taxable period to keep them from skidding and also for traction to help pull out of the mud. I think the fire engine shown in that picture has been scrapped. That tractor was put in the house December 20, 1922.

Plaintiff's Exhibit 447—(Formerly Plaintiff's Exhibit 1)—Photograph of Tractor drawn fire engine, as identified by the witness offered and admitted in evidence.

During the taxable period I saw Weed chains used on the car operated by the Chief and at that time the car which I myself used was equipped with Weed chains.

ALFRED WALLSMAN a witness, whose deposition was taken on behalf of plaintiff, at Louisville, Kentucky, on the 5th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, inclusive, I was machinist in the repair shop of the Louisville Fire Department. [fol. 298] I became connected with that Department in 1917 and am now foreman of the Department. I was familiar with the apparatus used in that Department during the taxable period and know what a Weed chain is. Weed chains were used in the Fire Department on the apparatus during that period, such as pumping engines, hook and ladder and hose wagons, Fordson tractor, Chiefs and Battalion Chiefs' cars. Plaintiff's Exhibit 1 is a Fordson tractor pulling an old steam fire engine. We took that tractor into the service in December, 1922, and still have it. I have seen it equipped with Weed chains during the tax-

able period. We use that tractor now in towing out of commissioned apparatus and pulling mired apparatus out of the mud. Occasionally in performing that service we use Weed chains on it. I won't state positive that I have seen other tractors in Louisville or elsewhere equipped with Weed chains. I myself have used this tractor in pulling apparatus out of mud holes. On one occasion I know positive was on Brook Street north of Adair in Louisville, Kentucky, where we had a hook and ladder mired in the mud and used the tractor with Weed chains on to pull it out.

Cross-examination.

Read by Mr. McMahon:

By cars I mean automobiles such as the roadsters and touring cars used by the Chief and Battalion Chief. I have seen a lot of automobiles and trucks using chains about the City during the taxable period. There was a good many more of those automobiles and trucks using chains than there were tractors around Louisville.

[fol. 299] JULIAN EDWARD GRIESHABER, a witness, whose deposition was taken on behalf of plaintiff, at Louisville, Kentucky, on the 5th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922, to June, 1924, I was in the city sales and stock room of the Louisville Auto Supply Company, Louisville, Kentucky. Our business was equipment and accessories. We were jobbers and sold Weed chains during that period by sizes. If a person came in to our place of business and asked for a certain size of tractor chain, we would ask him if 40 x 12 or what and if single solid, we would give him single solid. If single pneumatic we would give him single pneumatic size. If a person followed him and asked for truck chains of the same size as the size asked for, if he buys a solid or single pneumatic we would get it out of the same barrel of the same size. We go entirely by

sizes. Those chains were usable either on trucks or tractors of the same size tire. We did not sell tractors nor trucks. I have assisted in putting on these chains for customers. We would go out and try them on and see if they fit. In a lot of cases we would have to make them fit; that is, cut off lengths, possibly. We did that with either trucks or tractors, whichever the case may be and made no distinction in that respect during the taxable period or before or after that period.

[fol. 300] Cross-examination.

Read by Mr. McMahon.

When I say that chains could be used on trucks and tractors alike during the taxable period I mean like sizes could be used on either a truck or a tractor, provided the tires of the truck or tractor were of the same size. I sold lots of chains during that period for use on automobiles. The big majority of them were sold for truck use. We sell a chain that is adaptable for use on a Ford automobile. They do not use the same size of that *same size of* chain on a truck or a tractor. I am not in a position to answer anything about the number of automobiles and trucks in use in our trade territory during that period as compared to the number of tractors in use. I was not about the streets every day but was inside practically all the time. I came out in the evenings and went there in the mornings. Sometimes I walked and sometimes I rode in a street-car. I do not recall whether tractors were operating back and forth, pulling people to work, on the streets of our city during that period. Some automobiles were passing the street-cars now and then as I proceeded to and returned from the office. During that period trucks and tractors required the same chains as automobiles. Automobiles take a little lighter chain and trucks and tractors required a heavier chain. I think the size of the chains would be about equal for the amount used on passenger cars and the amount used on trucks, that is, there would be about the same number of sizes for tractors, trucks and passenger cars. All makes of [fol. 301] automobiles did not require the same size chain. All trucks did not require the same size chain. During that period the ordinary Ford roadster used several different sizes of chains. I think they used 3½ and 3-inch. If a cus-

tomer asked for a chain for his Buick sedan I gave him the size it was equipped with, which would fit it and it if was not equipped with any chain I would give him the size the tire was stamped. We did not fit the tire on his wheels, we gave him a chain that would fit the tire. I am not positive but I imagine the automobile and internal combustion tractor came out about the same time. The automobile and truck came out—of course, in proportion, the passenger cars were more numerous than the truck, one came out about as soon as the other. I could not say the passenger cars were first, that is before my time. I started work about 1915. The automobile is evidently older than I am and there was a lot of tractors out, we sold for, when I started to work.

JOHN G. GOSS, a witness, whose deposition was taken on behalf of plaintiff, at Louisville, Kentucky, on the 5th day of November, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922, to June, 1924, inclusive, I was and still am Superintendent of Public Parks, Louisville, Kentucky. I know of Weed chains and have used Weed chains in my [fol. 302] business as park superintendent. I used them during the taxable period on trucks, police cars and tractors. Plaintiff's Exhibit 2 represents some road equipment belonging to the Park Board which was used during the taxable period. The particular machine on which Weed chains are shown is a McCormick-Deering tractor pulling a rock spreader. Plaintiff's Exhibit 48 (formerly Exhibit 2) as identified by the witness—photograph of McCormick-Deering tractor with Weed chains pulling rock spreader, as identified by the witness, offered and admitted in evidence. We did not own that equipment during the taxable period but acquired it about two years ago. We used chains on tractors similar to that before. The tractor represented in this picture is drawing a drop-bottom wagon belonging to the Park Board. I have seen that particular tractor with chains on the tires used by the Park Board during the tax-

able period. Plaintiff's Exhibit 49—photograph of McCormick-Deering tractor with Weed chains pulling drop-bottom wagon of the Louisville, Kentucky, Park Department, offered and admitted in evidence.

ELMER H. BARNUM, a witness, called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922, to June, 1924, I was connected with the [fol. 303] Danbury Fire Department of Danbury, Connecticut. During that period we had a Webb-Pope fire apparatus vehicle which came equipped with 34 x 4 tires on each of the four wheels. The department always used Weed chains during bad weather on that vehicle while I was with the department. That vehicle was manufactured by the Pope Manufacturing Company of Hartford, Connecticut, and was used during the taxable period.

Cross-examination.

By Mr. McMahon:

The fire apparatus on that vehicle was mounted on a regular Pope-Hartford chassis with a special body on it or a hose wagon or a hose truck. I couldn't say whether that was an automobile chassis or a truck chassis. It was delivered to the City of Danbury as a fire apparatus but if they used the same chassis or changed it I couldn't say. It had the same identical engine that the pleasure vehicle had and the hood was the same and the radiator was the same.

WILLIAM C. ETTERSHANK, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922, to June, 1924, I was in charge of the general accounting records of the American Chain Company

as general accounting manager. In that position I handled [fol. 304] all accounting matters and am familiar with the books and records of that company for that period. My duties required me to account each month to the Government for Excise tax paid on tire chains. The tax was paid on the last or 30th day of the following month covering the previous month, to the Collector of Internal Revenue at Hartford, Conn. I looked after the Excise tax matters and the payment of tax for such company.

Q. Will you state whether or not any part of the Excise tax involved in these suits was ever collected directly or indirectly from the purchasers of the chains sold during the taxable period?

Mr. McMahon: The Government interposes an objection to the question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: How do you claim this is material under the issues?

Mr. Swindler: If your Honor please, it has been held in the Boyle Valve Company v. United States, a case in the Court of Claims, as well as the Jefferson Electric Company in that Court, and more lately, in November of 1930, I believe, by the Federal District Court of Indiana, sitting at Indianapolis, that this question as to whether the tax is [fol. 305] directly or indirectly collected from the purchaser is in issue, that it should be covered by proof before the Court in an action such as we have here for the recovery of Excise taxes. Under those authorities we tender this evidence and feel that our tender should be accepted.

The Court: To what paragraph of the complaint does that apply?

Mr. Day: Paragraph 5, your Honor.

The Court: Have you the section there, as to that?

Mr. McMahon: Yes, your Honor. The Willard Storage Battery decision. This paragraph as to that decision covers it.

The Court: 424?

Mr. McMahon: Subdivision 2 of Section 424.

The Court: If I understand the contentions of opposing counsel correctly, it has been established satisfactorily that

the Commission of Internal Revenue is vested with sole jurisdiction to pass on the issues that might be raised under Subdivision 2 of Section 424?

Mr. Swindler: I have not yet called the court's attention to the ruling of Judge Thomas, of this jurisdiction, denying that contention for purposes, I believe, that are material at present.

Mr. McMahon: I might say, your Honor, that since Judge Thomas' decision, this Willard decision has been made.

[fol. 306] Mr. McMahon's objection at the bottom of page 667 (formerly 314), of this record, read at the request of the Court.

The Court: Objection overruled.

Mr. McMahon: Note an exception. If the Court please, for the purpose of preserving the record, we would like to have the record show that this same objection should be written out by the reporter to each question asked the witness, calling for evidence as to whether or not this tax was passed on directly or indirectly, in order to avoid confusion.

Mr. Cohen: I think it would be well, if the Court please, that this shows that the exception on this point is granted to each of the three cases which are being tried, as this is a very important point.

Mr. McMahon: We have no objection to the record showing that.

Mr. Long: You do not have to repeat it again. The stenographer will insert it.

Mr. McMahon: That's it.

Last question on page 667 (formerly 314), of this record read by the reporter.

A. It was not. During 1919 I was in the capacity of general accounting manager of the American Chain Company and had to account to the Government for all Excise taxes paid. I made them up myself for a while.

Q. Now, will you state what action the company took with respect to these Excise taxes at the inception of the tax in 1919?

[fol. 307] Mr. McMahon: The Government interposes an objection to that question for the reason that section 424 of

the Revenue Act of 1928 vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. As I recall it, the Excise tax became effective around February 24, 1919. For a period of about 3 weeks we billed our customers at the regular price of chains—that is the same price they were in the prior period before the tax became effective and I can illustrate that best by saying that if the price of the chains was $10.00, and we stated that specifically on the invoice, that the price of the chains was $10.00 and also, underneath that, was shown 5% Excise tax, the 50¢ making a total of $10.50. That continued for a period of about three weeks, at which time——

The Court: Do I understand that during that period of three weeks, did the customers pay the tax?

A. I am coming to that now, your Honor. For three weeks, from the nature of these invoices, we passed the tax along. At the end of the three weeks' period our company decided to change its policy and to absorb the tax themselves as an expense and credit memos covering the tax pre-
[fol. 308] viously charged to the jobbers were forwarded to all customers thereby cancelling the amount of tax we had previously charged to them and those credit memos were actually posted to the customers' accounts on the Accounts Receivable Ledger.

By credit memo I mean that if a man bought a pair of chains on February 24, 1919, and he was charged $10.00 and also 50¢ for the Excise tax, making a total of $10.50, the credit memos that I am referring to, would represent the 50¢ Excise tax that we previously charged to him during that three weeks' period.

Q. After the three weeks' period did your company, at any time, show the selling price and tax separate on its invoices?

Mr. McMahon: The Government interposes an objection to that question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court

is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. No.

Q. Did your company, throughout the taxable period, continue to absorb, and pay, the tax?

Mr. McMahon: The Government interposes an objection [fol. 309] to that question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. We did.

Q. Did you at any time add to or include any of the tax here in controversy in your production costs?

Mr. McMahon: The Government interposes an objection to that question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: How is that?

Mr. Swindler: In the opening statement of counsel he contended that sometimes such tax was included in the production costs and thereby it was passed on. That is as I understand it.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. We did not.

[fol. 310] Q. Did your company, at any time, increase its selling price of tire chains on account of the taxes here in controversy?

Mr. McMahon: The Government interposes an objection to that question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

The Witness: This is confined strictly to the taxable period?

Mr. Swindler: Yes.

A. We did not increase our selling price.

Q. Did your company, at any time during the taxable period, show the tax on invoices of tire chains as an item separate from the price of said tire chains?

Mr. McMahon: The Government interposes an objection to that question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

[fol. 311] The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. No.

(Plaintiff's Exhibit No. 50—Department of Agriculture List, showing number of tractors manufactured and sold during 1909 to 1928 offered and admitted in evidence.)

WILLIAM C. ETTERSHANK, a witness, recalled by plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Day:

I have prepared a compilation of the toal amount of chains sold during the taxable period in question and the amount of tax paid to the Government upon those sales, and now produce it.

Plaintiff's Exhibit No. 51 (for identification), compilation of taxable sales during period July 1, 1922 to June 30, 1924, inclusive.

In explanation of this compilation and what the figures contained in such compilation represent, I desire to state:

This covers the period July 1, 1922 to June 30, 1924, and shows, in the first column, the amount of excise tax originally paid to the Collector of Internal Revenue at Hart-
[fol. 312] ford, Connecticut, on tire chains and miscellaneous other items. The second column represents the amount of refund received from the United States Government on cross chains upon which we previously paid the tax and the Government refunded that money to our company. I have thereby reduced the original amount of excise tax paid by the amount of the refund, which equals the excise tax claimed as the refund and the original claims submitted by our company. That is column three. These claims for refund were made up very quickly to protect ourselves against the Statute of Limitations. It was impossible, at that time, to throw out other items which we are now excluding from that claim, which consists of column four—pliers; and column five—adjusters. We excluded pliers, which is a plier manufactured by our company for the purpose of cutting the links of tractor chains and tire chains, which have been in evidence throughout. Adjusters are also used on tire chains, consisting of four pieces of chain with a hook and a spring which more or less tightens the chain. The emergency units are a piece of chain varying in length, which are wrapped around the tire. A blow-out chain is more or less similar to a blow-out patch. It consists of a chain and is used for wrapping around the tire so that in case you have any trouble it might carry you a few miles farther.

Jacks: That represents a jack made by our company for lifting purposes. It is worked on a chain and was more or less associated with trucks and fire engines, etc. Now, in making up that claim, originally those items were included. Therefore, for the purpose of the Court, I have deducted
[fol. 313] the total sale of those items and capitulated the tax of five per cent on certain sales, reducing our claim to an amended tax claim, which represents the excise tax paid solely on tire chains of all sizes. In order to show the taxable period involved in each of these three cases, I have divided Plaintiff's Exhibit No. 51 (for identification), into three different periods: one from July to December, inclusive, of 1922; one from January to December, 1923; and one from January to June, of 1924. The manner and

method of arriving at the figures in all three cases is exactly the same.

Plaintiff's Exhibit No. 51 (for identification), offered and admitted in evidence as a full exhibit.

I have prepared a compilation showing the number of different sizes of chains sold and the price received for the same and the amount of tax paid on the same, which I produce.. There are sixteen pages to this compilation as one exhibit.

Plaintiff's Exhibit No. 52 (for identification)—compilation showing number of different sizes of chains sold by the plaintiff and price received during the taxable period in explanation of the figures and various schedules included in this exhibit and the method which I arrived at these figures.

I might state: The excise tax was based on the sales value of tire chains and was paid in the subsequent month. [fol. 314] This sheet, covering the period July 1, 1922 through December 31, 1922, covers the quantity of pairs of Weed chains shipped during that period. The number of chains was taken from a card record which was a cumulative record of the total shipments by monthly quantities. The information from which these quantities were posted was taken from records of the company. In other words, copies of invoices that were forwarded to the customer. Due to the fact that this record included chains shipped for export and other non-taxable purposes, it was necessary, therefore, to eliminate the number of sales by size, shipped or sold for those purposes. Bringing down the figure in sales by sizes, which represents the actual number of pairs of chains by size, shipped and sold by our company, and upon which an excise tax was paid—due to the fact that the excise tax was paid on the total sales value of all kinds of chains, it was necessary to extend the quantity of each class and size by the selling price of that class and size existing at that time. The figure so arrived at, or the sales figure, would be in excess of the sales amount upon which our company paid the excise tax, for various reasons. For instance, there were certain adjustments made in correcting errors of pricing and extensions which exist in any organization. There were freight deductions made from cus-

tomers' invoices, cash discounts and rebates, and other adjustments of a similar nature. Therefore, knowing the amount of the tax that our company paid each month and the amount of the taxable sales each month, we reduced the gross sales down to the net sales on a percentage basis, which difference was very small. This adjustment we made [fol. 315] affects this report monthly by class and by size. Therefore, the total amount of excise tax paid, as shown on Exhibit No. 51 agrees, with the exception of maybe one dollar or two, with the excise tax paid by our company. Taking, for example, on the first page, the Weed 31 x 4 chain—it shows a quantity in pairs, 28,776. The next column is a Weed heavy chain of the same size of which we shipped 697 pairs. The next column is motorcycles, of which we did not ship any of that size. The next is a De Luxe chain of the same size, which is identical with these others, with the exception that the cross chain is a little heavier and of different construction. The next column represents the item of Rid-O-Skid, of the same size. That shows a difference of Rid-O-Skids, 12,839 or a total of sets of Weed heavy Motor Vehicle De Luxe Rid-O-Skids, size 31 x 4, totaling 83,129 pairs. In the next column the various headings represent sales values. By multiplying 28,776 pairs, under column one sets by the sales price in existence at that time, we get a sales value under the Weed column—$72,757.34 which is nothing more than the quantity, times the sales price in existence at that time. The same procedure follows through in respect to the other items—Weed Heavy, 697 pairs, times the sales price will give us a total sale of Weed Extra Heavy of $2,432.09. Motorcycles I will skip, because you do not wish it.

The De Luxe shows 40,817 pair, multiplied by the unit sales price which will give you a total sales value of $112,-308.19. Rid-O-Skid, in quantity of 12,839 pairs, multiplied by the sales price in existence at that time gives us a total [fol. 316] sales value of Rid-O-Skids of $18,022.66 or a total sales value of the various class of 31 x 4 size of $205,520.28. Inasmuch as that is the sales value we have multiplied that by the excise tax in effect at that time, which was five per cent, and the next column represents the excise tax paid on the quantity of 31 x 4 size of chains and the amount of the tax is $10,276.01, covering that item.

The first page of Exhibit 52 covers 4 classes of chains, which, for convenience, have been grouped on one sheet. Sheet number two, you will notice, has the marking "Single Pneumatics" in the upper left-hand corner. The same method in arriving at the various figures shown on that sheet was used as explained under the previous sheet. The next sheet, you will notice, has, in the upper left-hand corner, the marking "Single Solids". It shows the single solid by size and the excise tax is arrived at in the same manner as I previously explained on the first sheet. On the next sheet you will note in the upper left-hand corner, is the marking "Dual Pneumatics" by size. The same method in arriving at the figures on this sheet was used, as previously explained, covering the first sheet. The next sheet and last sheet cover "Dual Solids" tire chains, by size and the figures appearing on that sheet were arrived at in the same manner as explained, covering Sheet number one.

The method of arriving at the figures, throughout the entire three periods, is practically the same, with the exception of one period there may be more adjustments than in another period but the method is exactly the same and the resultant figures cover the same class of items.

[fol. 317] That is true also of the period January 1, 1924 to July 1, 1924.

Mr. Day: Now we offer this exhibit.

Mr. McMahon: The Government objects to the offer of Plaintiff's Exhibit Number 52 (for identification), as not the best evidence obtainable; that it does not reflect the sales accurately by month; constitutes reconstructed tax figures by the percentage method and shows a portion of the time paid on a 1/21st basis. The evidence of specific sizes sold in each month is not in issue and the provisions of Section 424 of the Revenue Act of 1928 precludes recovery regardless of the non-taxable claims of the plaintiff. Under the pleadings in issue made in this case, the question of recovery and specific sizes of chains sold, is not in issue and under the provisions of Section 424 of the Revenue Act of 1928, there are vested certain discretionary powers of the Commissioner of Internal Revenue which this court is without jurisdiction to determine or review.

Mr. Day: May it appear, for the record, Mr. McMahon, that the representatives of the Government have had op-

portunity to examine the originals from which these exhibits have been compiled?

Mr. Max E. Hoyt, representing the Bureau of Internal Revenue:

Your Honor, we made a spot check of certain months and portions of periods from sales invoices which the company [fol. 318] had and did the same with some of their control cards and I think we have thoroughly familiarized ourselves with the method or methods which they have used in reconstructing this tax and while there are, of course, some small discrepancies, in the figures, I am authorized to accept those figures definitely, subject to the approval of the Commissioner of Internal Revenue.

The Court: I understand then, that the Government has had an opportunity to examine the original records of the company from which this compilation is made?

Mr. McMahon: If the Court please, that is the distinguishing feature existing between the original records and the records from which this compilation is made. That is the reason for the difficulty in answering your question. If you limit the question to the question of the records from which the compilation is made——

The Court: Have the gentlemen had opportunity to examine such of the records of the plaintiff as they desire in this case? Has the defendant had this opportunity?

Mr. Hoyt: We have.

The Court: I will overrule the objection except insofar as it is based on the claim that the compilation offered is in turn based on the matter of expenditures. I confess that the evidence is in such a state that I feel unable to make a final ruling on that part of it, and the Court would suggest that, if they can do so, counsel explain more fully, through [fol. 319] the witness, the features of the compilation to which that particular objection is directed.

Mr. McMahon: Note an exception.

I am a trained accountant and my position was in charge of the accounting system of the American Chain Company. I used the percentage method in determining the net price for a specific item of chains each month because the number of invoices during this taxable period was about

350,000. When the excise tax was originally paid, that only occasioned an adding machine for computing tax on the total sizes of Weed chains regardless of class or of size and it was a very small job in arriving at the amount of tax. In the time permitted to produce these figures in a manner showing the exact sizes, the exact sales and exact tax paid by month, that would take about three months' time, but our company knew exactly the number of pairs of tire chains of a given class and a given size that were sold and those records were taken from copies of customers' invoices and the same information from what these figures were taken the excise tax was based on. We can readily see that if we issue a credit memo for an error in an extension of $5.62, you will have thirty or forty different kinds of pairs of chains affected. You would have to take $5.62 and divide it into thirty or forty sizes. We had a cash discount which was allowed our customers not on a specific size of the chain, but on the total amount of the invoice. Again, that cash discount would have to [fol. 320] be prorated by classes and by about fifty or sixty sizes, each month and the tax figures and the interest figure. We also have the item of freight. Where the total quantity of tire chains of various sizes may equal one thousand pounds the freight rate is $2.60 per one hundred pounds. The freight was deducted in its entirety from the total sales values of all class of chains. There again, the amount of the freight would have to be applied against the various styles and sizes of each invoice for each month. I did find, however, that the amount of these adjustments which I am covering amounted to approximately six per cent of the total adjustments made which were six per cent of the total sales so, therefore, these figures, from my viewpoint, represent an efficiency of ninety-four per cent. If you take the sales for a given month—we will say that the total sales for a given month were one hundred dollars. Taking a concrete figure, the net amount on which we paid the tax was ninety-four dollars. There would then be six dollars in that hundred which would represent these various allowances which we were unable to separate against each particular size of chain. Now, in applying that percentage, we would take, for instance, one particular size of chain and ascertain what the total sales price of that type of chain was—one dollar, for instance, and this would

be actual figures, and then to determine the extent to which our sales price on that particular type of chain should be reduced to bring it down to the net price on which we pay the tax we simply took the six per cent figure and deducted [fol. 321] it and brought it down to ninety-four cents. That was done each month and by each style and each size. I think the method I followed, from an accounting standpoint, represents substantially correct procedure to the extent of ninety-five per cent. I know of no other way you could do it. I think Mr. Hoyt and I worked this up together. I mean the method.

Mr. Day: We renew our offer now.
Mr. McMahon: The same objection.
The Court: May I confer with counsel?

(Conference held.)

Mr. Day: That is all.
The Court: Do you renew your offer?
Mr. Day: Yes.
Mr. McMahon: The defendant renews its same objection.
The Court: The question is of such importance that since we have come to the time for recess I think I will consider it over recess.

I have been an accountant since 1912. I appeared before the United States Government on numerous tax cases. I have a card entitling me to practice before the United States Government, that is, the Treasury Department. I have been in Washington at least thirty times before different representatives of the Treasury Department, not only for the American Chain Company but for other companies. I assisted in the preparation of the income taxes and supervised the examination of the income tax of the American Chain Company and other companies and I have done that [fol. 322] class of work right down to the present time. I have worked on refinancing of organizations and constructive accounting of the installation of cost systems of at least a dozen companies. I do not happen to be a certified public accountant and I have never taken an examination.

At no time could the price received for individual sizes of chains during any given period, a month, six months, or a year, have been determined without resorting to a percentage figure such as I have used in my present compilation.

As an illustration, here is an invoice owing to John Smith and Company and on the invoice it covers 10 different sizes of Weed chain, 30 x 3½, 31 x 4, and various sizes. Those sizes are priced at a list price, say $5.00, $6.00 and $7.00. We multiply the number of pairs of a given size by the list off of each particular size. From that sum is deducted or deduct the freight and trade discount in effect at that time, which we will say is fifty per cent, so we take fifty per cent off the total of the sales value and not fifty per cent off of each particular size. Ffrom that sum is deducted a sum representing freight that was allowed the customer. As an illustration, the invoice is $100.00. We deduct ten dollars for freight. The customer pays ninety dollars. Now that ten dollars in freight covers freight, not on one size but on all sizes. To get the actual freight by sizes we would have to take the weight of each chain, multiply it by the number of pairs, take the total weight and find the relative percentage of each weight of an individual chain of the total and multiply it by the freight rate.

[fol. 323] The item of cash discount would be in the same category as freight. If a customer pays a bill in ten days he is allowed two per cent of the total amount and this two per cent, therefore, in real-ty, covers all sizes and the only way that can be procured is by a percentage basis, dividing the cash discount by representative values. There is another item which we call a price adjustment. There may be some clerical errors in the extension. We may have put down the wrong extensions or added the figures up wrong. In that case we simply sent a credit memo. correcting the bill and perhaps sent a credit memo. to the customer of $5.60 which may cover twenty or thirty sizes. Again, that would have to be all reworked out.

The Court: And further questions?

Mr. Day: No.

The Court: I will overrule the objection.

Mr. McMahon: Note an exception.

The Court: An exception.

Plaintiff's Exhibit No. 52 (for identification) laid in evidence as a full exhibit.

7

Cross-examination.

By Mr. McMahon:

The freight could be applied through another method which would take probably three months by taking the total weight, going back through three hundred and fifty thousand invoices, as I think, perhaps, I explained. Taking the actual invoices you could allocate freight by two methods. [fol. 324] I have adopted one method and the other method would be by taking the total weight and multiplying it by the weight of each size of chain and you would have six or seven hundred thousand calculations. That is the only other method by which you could allocate that freight. There are no methods by which you can allocate the discount. There may be other items on the invoices besides chains and that would be two per cent on the invoice and the cash discount would be on money value. You have no better way of doing it. I explained the fact that the reconstructed value of chains shipped applied to Weed chains, for possibly the months of August to December 1923 and the first six months of 1924 compiled from the production control cards. It shows sales of $617,800.09, while the tax actually paid for this period forced me to reduce the taxable values of the chains shipped to $496,612.30 by the fact that those figures differ through the entire period. The first set of sheets states the quantity multiplied by the sales prices in existence at that time. Those figures were later reduced to take care of adjustments such as I have spoken about, bringing them down to the net sales multiplied by the tax which will give you the exact amount of tax paid, so that you have two sets of figures there. I don't know that it reduced the amount practically twenty per cent. The difference of $617,000 as against $496,000 for the six months period in 1924, roughly speaking, is twenty per cent. The items that enter into the difference between those figures, that causes the reduction, are the re- [fol. 325] bates, terms, allowances, freight, tax, and during the portion of the period, an item of 1/21st. This item of 1/21st in certain respects refers to the basis of computation of tax or the tax we paid. During the first six months period in 1924 our chains were five dollars a pair. I think during the latter part of July, 1924, or the early part of August, 1924, our selling price of those chains was still five

dollars a pair. It was our understanding that if we notified the customers that 1/21st of the above amount represented excise taxes, then the company could save five per cent of the tax payable. Then part of this excess between the $617,000 and the $496,000 is in a measure taken up, in part at least, by this 1/21st on which the tax was computed, as I stated before. If we billed a customer a pair of chains for five dollars, that constituted the amount the customer paid, say five dollars in both cases, before and after, and 1/21st of that amount represented the tax, that is what we put on our invoices. Our invoices did not state that 20/21sts or 21/21sts, minus 1/21st, equalling 20/21sts, constituted the selling price. That is not a fact. The difference is that our company never, during this taxable period, increased their prices of chains to its customers with the exception of an occasional change in price, maybe of a few sizes, but nothing to do with the excise tax. The amount the customer paid in 1922 up to the period you are speaking about, is the same he paid in subsequent period ending June 30, 1924. He paid the same amount for his chains during the first six months of 1924 that he did in the previous [fol. 326] period. If the customer paid five dollars that did not represent 21/21sts, it represented our sales price of five dollars to the customer, and we computed the tax on the basis of 1/21st on that price and stamped our invoices with 1/21st of that price which represented the tax. The customer paid the five dollars, less freight. The customer paid 21/21st, that is he paid us five dollars. I would not say that the customer paid that 1/21st, as well as the 20/21st. I simply state our invoices had the same price on as they did in the prior period when our company notified its customers that 1/21st of the above amount represented excise tax, affording our company an opportunity to save a tax on a tax and thereby reduce our expenses by five per cent. That was the purpose of the stamp. There is no question in my mind but that the customer paid the five dollars and there is no doubt in my mind but what our invoices were stamped 1/21st of that five dollars representing tax. That same condition applied during 1923 with respect to this 1/21st, as I recall it. I do not think it applied throughout the entire year. I think it applied from the latter part of July or the first part of August, 1923. I think we computed our tax on the basis of 1/21st from the

latter part of August 1923 to June 30, 1924. That period is represented in two of these suits. That would be the suit covering part of the year 1923 and the suit covering the first six months of the year 1924. I do not have the price lists with me in effect at that time, from which I made the [fol. 327] computation. I could get them. I will get them and bring them into Court.

The Court: The ruling of the Court is that if the gentleman can produce those figures without delaying the trial, he can do so, but I don't want to delay the trial.

Mr. Day: Your Honor, Mr. McMahon has no objection so far as identification is concerned to Plaintiff's Exhibit 53. This is a recapitulation of these figures on each of the sizes with the interest computed from the last payment day up to October 27. That is simply for the purpose of showing the jury on each size the amount plus the interest with the date from which it was computed, and in each of these periods. Take, for instance, the first period, which would be from June 30, 1922, to January 1, 1924, all payments were made monthly. That is, the shipment of July would be paid on or before the last day of August. In computing the interest, we have computed all our interest from the last interest date of payment, which would be January 31, 1923, so that is all in favor of the Government, and I understand Mr. Hoyt says, so far as the last day method of computing interest is concerned, there is no question about it, therefore I offer Plaintiff's Exhibit 53—recapitulation of figures on each size of chain sold during the taxable period with interest computed thereon.

Mr. McMahon: The Government interposes the same [fol. 328] objection to the offer of this exhibit as it interposed to the offer of Exhibit 52.

The Court: The same ruling, admitted.

Mr. McMahon: Note an exception.

Mr. Day: We have nothing more to offer, we rest.

MOTION TO DISMISS

Mr. McMahon: The defendant renews its motion to dismiss, heretofore made in this case, and moves the Court to dismiss each of the cases, numbers 3360, 3371, and 3421, on each of the following grounds:

The provisions of Section 424 of the Revenue Act of 1928 deprive the plaintiff of its privilege of refund in each of these cases for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1926. 2. The provisions of Section 424 of the Revenue Act of 1928 deprive the plaintiff of its privilege of instituting and maintaining each of these actions for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921 subsequent to May 29, 1928, the effective date of such act. 3. The provisions of Section 424 of the Revenue Act of 1928 vest certain specified discretionary powers in the Commissioner of Internal Revenue, which this court is without jurisdiction to determine or review. 4. The provisions of Section 424 (a) (1) of the Revenue Act of 1928 limit the jurisdiction of this [fol. 329] court to hear and determine the issues in each of these actions for the recovery of manufacturer's excise tax paid and collected under the provisions of Section 900 (3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928. 5. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, which is exclusive of all other revenues. 6. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921 regardless of the nontaxable claims of the plaintiff.

The Court: The motions are denied.

Mr. Cohen: In each case?

The Court: In each case.

Mr. McMahon: Note an exception in each case on each ground.

The Court: It may be so noted.

MOTION TO EXCLUDE TESTIMONY

Mr. Cohen: At this time the defendant, in each case, moves that all the testimony given by the various witnesses in these cases with reference to the various sizes

of chains be excluded as being incompetent, irrelevant and immaterial to the questions involved.

The Court: Motion denied.

Mr. Cohen: May we have an exception in each case?

[fol. 330] The Court: An exception in each case.

COLLOQUY

Mr. McMahon: If the Court please, I believe in view of the fact that it is our recess time that we might be able to expedite things much more if we would take our noon recess now and put all our evidence in immediately following the reconvening of the Court and give us an opportunity to assemble and get it in shape.

The Court: I thought that counsel for the plaintiff had some motions that they cared to present.

Mr. Long: We have no motions.

The Court: I have already indicated to counsel informally that the view of the Court is that under the Revenue Law controlling these actions it is necessary to consider each class and each size of chain separately and I have it in mind that when the time comes I shall be prepared to charge the jury accordingly. The plaintiff has now finished and I can't see that any evidence that the defendant can possibly offer will affect the observation and the suggestion that I want to make at this time. Feeling as I do that the triers of fact must consider each chain separately, it becomes evident that the triers of fact, in the event that they shall find for the plaintiff, will have a difficult task by way of computation. This occurred to me as the trial started. All these days of testimony, I have observed, have only increased that condition, and now, that the plain-
[fol. 331] tiff's evidence is all in, I want to say to you the view I take of it. The task required of the triers of fact, in the event that they shall find for the plaintiff, is a task for which a jury is without adequate facilities satisfactorily to perform. I confess no lack of faith in the jury system. I recognize that each party has a constitutional right to trial by jury but I do believe that if the institution of the jury is to — preserve- as a useful institution, under certain conditions it is occasionally necessary, in view of the unusual features relating to the case which

may occur, I want the parties to restrain themselves from this exercise of their constitutional rights. Conceivably every man has the right to hunt house flies with a shotgun but there are occasions when it is not a proper tool; and I suggest, gentlemen, having heard all the plaintiff's testimony, that it is the opinion of the Court that the jury, in the interests of justice, be waived in this case. The decision by the Court will necessarily give counsel every finding of facts that it could possibly have. So far as I can see, it would impair in no respect any right which it is desirable and proper to preserve for purposes of justice, and so, gentlemen, I wish to inquire whether, in view of considering the opinion of the Court in this connection, you will not waive the right to trial by jury and consent to take the case from the Jury? What do you say, Senator Long?

[fol. 332] Mr. Long: We agree to that suggestion for the plaintiff.

The Court: What do you say, Mr. McMahon, for the defendant?

Mr. McMahon: The defendant can not agree with the Court's suggestion.

Mr. McMahon: Off the record. That is what I spoke to your Honor about the other evening rather informally.

The Court: I am very obviously speaking for the record now. I want to inquire why it is that counsel of record in this case find themselves unable to accept a considered suggestion of the Court on a matter of such importance.

Mr. McMahon: The reason why the defendant desires to continue the case and the case be submitted to the jury and without the waiver of the jury is that the position of the defendant with respect to the question of whether or not the particular chains involved in this case are accessories on an automobile can be only determined in conformity with the constitutional rights of the defendant by the jury, and it also appears of record that the jury was requested in this case—the jury was insisted upon in this case by the proper officials in Washington having ultimate authority with respect thereto.

The Court: In view of that fact, the Court will venture to suggest that counsel appearing of record for the defendant forthwith communicate with his superior by telephone, [fol. 333] conveying the compliments of the Court and giv-

ing the substance of the opinion of the Court as just set forth and say that we await their decision.

Mr. McMahon: Just let me understand you correctly. I had this matter up with them while in Washington over Sunday and I told them—

The Court: I don't care to go into that, Mr. McMahon. I have refrained from any definite suggestion until I should see where the close of the plaintiff's evidence left us, and now, that the plaintiff has rested, I am satisfied that this is not a proper case for the jury and that being so, before I put it to the jury, I feel it my duty to make sure that no stone has been left unturned to make that unnecessary for the reasons that I have already stated.

Mr. McMahon: I shall communicate with the proper officials in Washington as promptly as possible by telephone and report the answer to the Court.

The Court: And come in at one thirty.

DEFENDANT'S EVIDENCE

MAX E. HOYT, a witness called by defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. McMahon:

I am Chief of Sales & Capital Stock Section of the Miscellaneous Tax Unit in the Bureau of Internal Revenue at [fol. 334] Washington, D. C. In that position I have to do with the claims for refund filed by taxpayer and in the making of investigation with respect to such claims for refund such as the investigation of articles, etc., with respect to tax classification. I conduct such investigations personally or cause them to be conducted under my supervision and instruction. My duties involve finding the facts that exist and requires a thorough investigation of any evidence which a taxpayer submits. Also an investigation of all available information and statistics in the Library of Congress or other sources of that nature, as well as investigations in the various governmental departments for assembling information pertaining to whatever subject I am working on. I caused such investigations to be made in connec-

tion with the claims filed by the American Chain Company. Defendant's Exhibit L (for identification) is a claim for refund on Form 843, filed by the American Chain Company on January 27, 1927, attached to which is a photostat copy of a letter from the Bureau to the American Chain Company under date of July 5, 1927, and a tabulation prepared on the letterhead of the American Chain Company dated January 27, 1927, apparently covering tax paid and claimed, and dates of payment, in addition to which the certification made by the Collector showing the amounts and dates of payments. I have the original claim for refund and a copy of that letter in my possession as part of the records of the Bureau of Internal Revenue and that is a true copy of such [fol. 335] records. Defendant's exhibit M (for identification) is a claim for refund on Form 843, filed by the American Chain Company, executed on August 30, 1926, in the amount of $183,365.49, attached to which is a tabulation prepared on the letterhead of the American Chain Company showing the amount of tax paid and the amount of tax claimed as refund and the dates of payment, together with a letter dated August 23, 1927, addressed by the Bureau to the American Chain Company rejecting its claim for refund. I have the original of that claim and the Bureau copy of that letter in my possession as part of the Bureau records. Defendant's Exhibit M. is a claim for refund on Form 843 filed by the American Chain Company, being executed under date of February 15, 1928, in the amount of $105,031.43, attached to which is a schedule of excise tax payments for the period January 1, 1924, to June 30, 1924, showing the amount of tax paid and the date paid, together with a letter from the Internal Revenue Bureau mailed by the Commissioner of Internal Revenue to the American Chain Company dated March 15, 1928, rejecting this claim. I have the original of this claim for refund and the Bureau copy of the letter attached in my possession as part of the files of the Bureau of Internal Revenue. The claim for refund identified as Defendant's Exhibit L is for the period July 1, 1922, to December 30, 1922. The claim marked Defendant's Exhibit M is for the period January 1, 1923 to December 31, 1923, inclusive. The claim marked Defendant's Exhibit N is for the period January 1, 1924 to June 30, [fol. 336] 1924. Defendant's exhibit L, claim for refund for period January 1, 1923, to December 30, 1923, inclusive,

offered and admitted in evidence as a full exhibit. Defendant's Exhibit M, claim for refund of the American Chain Company for excise taxes paid during the year 1923, together with data submitted to the Bureau of Internal Revenue, and letter of rejection offered and admitted in evidence as a full exhibit. Defendant's Exhibit N, claim for refund of American Chain Company for excise taxes paid during the period January 1, 1924, to June 30, 1924, together with data submitted to the Bureau of Internal Revenue and letter of rejection offered and admitted in evidence as a full exhibit. Defendant's Exhibit F is a price list and advertising circular of the American Chain Company, showing list prices in effect April 18, 1923, on Weed chains for pneumatic and solid truck tires. It has various illustrations and prices of sizes of chains in it. This exhibit was picked up and in the field and submitted to the Bureau for use in connection with this case by a revenue agent of the Bureau of Internal Revenue which he stated he obtained from the company. I am certain it came from the company because I have seen copies of these same things in the company's office. That is true with respect to Defendant's Exhibits F, G, H, I and J. In connection with my duties I made an investigation or a search of the patent records with respect to patents covering the particular chains involved in these cases. I might say at the beginning that I got all four of these copies, being Defendant's Exhibits A, B, C and E [fol. 337] from the Patent Office last week. I abstracted those exhibits from the records of the Patent Office myself. I made an investigation or search of the records of the Department of Agriculture and the Department of Commerce, and Interstate Commerce Commission, or other departments, with respect to these chains with respect to trucks, tractors, the number of such trucks and the number of such tractors used and manufactured during the periods covered by the taxable periods involved in this suit. I produce such records. Defendant's Exhibit O offered and admitted in evidence. Defendant's Exhibit P offered and admitted in evidence. Defendant's Exhibit Q offered and admitted in evidence. Defendant's Exhibit R offered and admitted in evidence. Defendant's Exhibit S marked for identification. Defendant's Exhibit T offered and admitted in evidence. Defendant's Exhibits U, V and W marked for identification and withdrawn. Defendant's Exhibit X offered and ad-

mitted in evidence. Defendant's Exhibit Y offered and admitted in evidence. Defendant's Exhibit Z offered and admitted in evidence. Defendant's Exhibit AA offered and admitted in evidence. Defendant's Exhibit BB offered and admitted in evidence.

Jury Waived

Mr. McMahon: If the court please, will the court please withhold the jury until the defendant makes a motion. In view of the fact that counsel for the defendant has communicated with the proper officials in Washington with [fol. 338] respect to the submission of this case to the court and the waiving of a jury and has been instructed by Mr. A. R. Marrs, Assistant Commissioner, that the case should be given to the court and the jury waived, consequently, the defendant at this time waives the submission of this case to the jury.

The Court: Do counsel for plaintiff agree?

Mr. Day: Yes, we agree but isn't there something more in the matter of procedure? Isn't it necessary under the federal practice that a stipulation be entered into and it must be decided by the court?

Mr. McMahon: You mean a written stipulation?

Mr. Day: I mean shouldn't that be prepared?

Mr. McMahon: It should be submitted even before the court proceeds with the case. You can complete your record now that this stipulation has been entered and filed as far as we are concerned.

The Court: Proceed on that basis. You can file the stipulation afterwards. Now what are your wishes with regard to the case? How much more have you got, Mr. McMahon?

Mr. McMahon: There is, I imagine, only Mr. Hoyt and Mr. Dodge. I am still a little confused about these exhibits. As I understand it, those are admitted in evidence?

The Court: Those that are in are in and those that are [fol. 339] out are out. Then there is no use in continuing this examination if the case is to be submitted to the court. You might explain them to the court; they are self-evident, I suppose. They are self-explanatory.

Jury Excused

The Court: Gentlemen of the jury, counsel in this case have just come to an agreement whereby they will with-

draw the case from the consideration of the jury and submit it to the court. Accordingly, in so far as this jury is concerned, the record is now closed. Jury excused.

Direct examination (cont'd).

By Mr. McMahon:

I know which was first in the point of time, the advent of the automobile or the advent of the tractor. The advent of the automobile was first in point of time compared to the advent of the tractor. I know whether or not chains were used on automobiles prior to the advent of the tractor. Weed chains were used on automobiles prior to the advent of the tractor. I know which was first in the point of time, the advent of the truck, or the advent of the internal combustion tractor. Weed chains were used on trucks prior to the advent of the tractor. As a matter of fact the chains in use on automobiles prior to the advent of the truck were redesigned and adapted for use on trucks. The chains in use on trucks prior to the advent of the tractor were redesigned and adapted for use on tractors. I [fol. 340] know whether or not the duty requirements of a tractor in its respect to the use of chains—a Weed chain—are the same as the duty requirements of an automobile with respect to the use of Weed chains. In connection with my duties as the head of the department or section which I represent I have something to do with the design or engineering features involving duty requirements as affecting design with respect to tire chains and any of these parts and accessories for automobiles as we always have to look at that element. I do not claim to be a technical engineering expert and wish to testify only with respect to the practical phases of those questions as applied to the administration of the taxing statutes.

Q. I will ask you Mr. Hoyt, if there is any difference for practical purposes between the duty requirements of a truck with respect to the use of chains and the duty requirements of an automobile with respect to the use of chains.

Mr. Day: We object, your Honor. He has taken this witness and asked him whether or not he knows the answer to that, then he asks a question which calls for an expert conclusion, based on the knowledge of mechanics

and the manufacturing operations in connection with these chains. In other words, he is simply qualifying him by his own statement. Mr. McMahon made this same objection that he hasn't shown that the witness is qualified and he is now required to qualify this witness and ask him his experience and knowledge. I think this is the wrong way [fol. 341] to prove it. I think the right way is to prove the method of uses and how they differ.

The Court: Sustained.

Mr. McMahon: Note an exception.

The Court: Exception.

Q. As a practical proposition, Mr. Hoyt, does the revolving speed of an automobile possessing chains attached to such automobile affect in any way such chains?

A. Yes.

Mr. Day: I move to strike out the answer and object to the question on the ground that he isn't qualified to answer.

The Court: Sustained. Motion granted.

I own an automobile and have traveled about the country extensively. I have seen automobiles, trucks and tractors in operation with chains and have applied chains to the tires of my own automobile. I have worn out a pair of chains and have observed the operation of passenger automobiles with chains on. I have observed the wear on those chains.

Q. Now tell us, as a practical proposition, from your observation, does the speed at which an automobile wheel turns when it has chains on it have any wearing effect on such chains?

Mr. Day: Object.

The Court: The question is if the speed has a wearing effect, Mr. McMahon.

Mr. McMahon: Yes.

Mr. Day: You haven't shown yet how he is going or on [fol. 342] what knowledge he is going to testify to that effect.

Mr. McMahon: His observation.

Mr. Day: You don't assume while he is driving the car he can watch the chains and see how fast they wear out, do you?

Mr. McMahon: He says he has observed chains.

Mr. Day: Either you must show from expert knowledge, or you must show from actual observation.

Mr. McMahon: That is just what I have shown. He has testified that he has owned a car and put chains on it and he has watched automobiles and trucks in operation.

Mr. Day: I object to that question unless and until he shows the method of observation in order to determine the result of his observation.

The Court: Sustained.

Q. What observation have you made Mr. Hoyt with respect to the use of chains on automobiles and the use of chains on trucks and the use of chains on tractors? Tell us all about it.

A. Well, of course, I have seen chains on all three types of vehicles. I have seen them in various stages of repair and disrepair, whatever you want to call it. I have also had plenty of experience with cars of my father's on which he had Weed chains and I had plenty of opportunity to observe the effect of wear on them.

Mr. McMahon: I will repeat the question. Do you want to object?

[fol. 343] Mr. Day: Object.

The Court: Sustained.

Mr. McMahon: An exception.

The Court: Exception.

W. Ernest Dodge, a witness called by defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. McMahon:

I am claims auditor for the Miscellaneous Division of the Miscellaneous Tax Unit of the Bureau of Internal Revenue. During July, 1922, to June, 1924, inclusive, I was attached to a group which issued rulings with respect to the taxability of any article submitted or inquired about with respect to the tax. As part of my duties we analyzed what is described as parts and accessories for automobiles and

classified them for taxing purposes. I am familiar with all of the parts and accessories commonly used in connection with automobiles. I have examined all makes and types of parts and accessories submitted by the manufacturers to the Bureau during the taxable period for the purpose of classifying such parts or accessories with respect to taxation. I examined tire chains submitted to the Bureau for the purpose of classifying them for taxing purposes. I make an investigation with respect to such tax classification of such articles. I know what a carburetor, valve, and tire chain are. I know nothing about the design [fol. 344] of those tire chains. I know the principle on which a carburetor works. The advent of the automobile was first in point of time compared to the advent of the tractor. The advent of the truck was first in point of time compared to the tractor. Tire chains were used on automobiles prior to the advent of the truck. I do not know definitely when the advent of the truck occurred, the war brought on its greatest development. I believe Elwood Haynes made the first practicable automobile in 1893. The advent of the tractor, which was a production of the war, was subsequent to the war, I would say, and subsequent to the development of the truck. Tire chains were used on trucks prior to the advent of the tractor. I cannot give anywhere near an accurate percentage of the number of automobiles and trucks in use during the taxable period from memory. I know which was greater. The trucks and automobiles were much greater. In determining the taxability of chains, we took into consideration all the patents we could find, Defendant's Exhibits A, B, C and E being among them.

Q. Did you classify the chains sold by the American Chain Company during the taxable periods which are involved in this suit? Answer yes or no.

A. If I remember correctly we never considered the American Chain Company's chains.

Mr. Day: He can answer that yes or no.

Q. (Last question read by the reporter.) That is, did you classify them for taxing purposes?

A. If I remember correctly we never gave a ruling to the Chain Company.

[fol. 345] Mr. Day: Just a minute.

The Court: Mr. McMahon, after all, this is a Court and to take one of your men from the counsel table and put him on the stand and then confer with him in the middle of an examination, I think passes the bounds of procedure.

Mr. McMahon: I apologize for that but I was trying to save time and I withdraw the question. That is all.

Mr. Day: No cross examination.

Mr. McMahon: Defendant rests.

DEFENDANT'S MOTION FOR JUDGMENT

Mr. McMahon: The defendant now desires to make a motion for judgment in each of these cases Nos. 3360, 3371 and 3421 which have been consolidated for trial. The defendant now tenders for filing in each of these cases Nos. 3360, 3371 and 3421 written motions for judgment.

The Court: Motions may be filed.

Mr. Day: May I ask one thing as a matter of information, your Honor, on this question of whether the case should be determined on the basis of particular sizes or not: I would rather assume that the announcement, which your Honor has made, represented the way your Honor was thinking at the present time and that you have no objection to our introducing our argument on any phase of the case.

(At this point there was further conversation between the Court and counsel, followed by the oral arguments of counsel.)

Mr. Long: The plaintiff in this case requests specific [fol. 346] findings of fact and conclusions of law.

Mr. McMahon: The defendant requests specific findings of fact and conclusions of law, and let the record show that both parties request additional time to file requests for special findings of fact and conclusions of law.

The Court: How much time do you want?

Mr. Long: Within thirty days. The plaintiff desires twenty days to file a supplemental brief and specified findings of fact, if the Court desires any suggestions on the facts.

The Court: I should be very glad to receive requests—specific requests for findings of fact or of law.

Mr. Long: For specific findings of fact or conclusions of law we want twenty days to do that.

The Court: I don't think there is any point in sending in your request for a finding before your brief. I would suggest, therefore, that each side take thirty days to file whatever they want—requests and briefs.

The Court: I will allow each side thirty days to file anything they want in the way of briefs and requests and thereafter I will allow each side a week for reply and thereafter I will give you the decision as quick as I can and I will continue matters now until the month of December.

[fol. 347] Thereafter, briefs and requests for findings of fact and conclusions of law were duly filed by both parties, and the Court, after due consideration rendered his decision in favor of the plaintiff and against the defendant, as appears from the record herein.

Thereafter, the Court entered judgment in each of the above entitled causes upon said verdict, as appears of record herein, in favor of the plaintiff and against the defendant, to all of which the defendant, at the time, duly excepted.

ORDER SETTLING BILL OF EXCEPTIONS.

Inasmuch as the rulings and exceptions specified in the foregoing bill of exceptions, do not appear in the record of each of the above entitled causes, I, Honorable Edwin S. Thomas, Judge of the said Court, after due notice given to the plaintiff herein, have settled and signed the said bill, and have ordered that the same be made a part of the record of the said cause, this 13th day of July, A. D. 1932, as a true, correct and complete bill of exceptions.

Edwin S. Thomas, United States District Judge.

Approved as to form.

—— ——, Attorney for Plaintiff.

[fol. 348] IN UNITED STATES DISTRICT COURT

Nos. 3360, 3371, 3421. Law

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 14, 1932

Now comes the defendant in the above entitled causes and files in each of such causes, the following assignment of errors upon which he will rely upon his prosecution of the appeal from the decree and judgment entered in each of such causes by this Honorable Court on the 14th day of April, A. D. 1932:

I

The United States District Court for the District of Connecticut erred in overruling each of the motions interposed by defendant and appellant in each of the above entitled causes to dismiss the original complaints filed in each of such causes.

[fol. 349]

II

The Court erred in overruling defendant's objection to the following question and in permitting the witness to answer:

"Q. Had the above sizes of Weed chains for use on automobiles or trucks any peculiar characteristics which were not identical with Weed chains for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to the question for the reason the witness has not shown himself qualified to answer; it is not the best evidence; it calls for the conclusion of the witness; assumes facts to be true which have not been shown by the evidence and usurps the power of the jury.

The Court: I understand the question asks for physical differences, if any, between two chains.

Mr. McMahon: If the Court please, I can see your view of the question asked, but the question that is bothering me is: Does that lead to the question of design or does it specifically refer to particular sizes of chains. In other words the question is too general to apply to anything other

than design. Peculiar characteristics are part of design and this witness certainly isn't qualified to testify as to that.

Mr. Long: This witness is qualified to testify to design. They had to make a chain.

[fol. 350] The Court: I will allow the question.

Mr. McMahon: May I ask one question. What are 'the above chains'?

Mr. Long: The above sizes. We have had the size here—the above sizes of Weed Chains.

Mr. McMahon: Note an exception to the question ruling.

A. No, they did not."

III

The Court erred in overruling defendant's objection to the following question and in permitting the witness to answer:

"Q. Were the Weed Chains manufactured and sold by the American Chain Company upon which the taxes in this suit were paid, interchangeable for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to that question as applied——

The Court: I will admit it.

Mr. McMahon: Note an exception on the ground that the witness has not shown himself qualified to answer; it calls for a conclusion of the witness; assumes facts to be true that are not shown by the evidence; it is not the best evidence and usurps the power of the jury with respect to use.

The Court: Exception noted.

A. They were."

[fol. 351]

IV

The Court erred in overruling defendant's objection to the following question and in permitting the witness to answer:

"Q. Were suitable sizes of such Weed chains manufactured and sold during the taxable periods, used generally on automobiles and trucks, interchangeable for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to that question for the reason that the witness has not shown himself qualified to answer; it calls for the conclusion of the witness; assumes facts to be true that are not shown by the evidence; it is not the best evidence obtainable; and usurps the power of the jury.

The Court: Admitted.

Mr. McMahon: Note an exception.

The Court: Exception noted. You may answer.

A. They were."

V

The Court erred in sustaining plaintiff's objection to defendant's offer of Defendant's Exhibits A, C, D and E in connection with the cross examination of plaintiff's witness, William Thomas Morris (pp. 7 and 8 of attached bill of exceptions), and in excluding such exhibits:

"Mr. McMahon: Is it the rule for the defendant to offer evidence on cross examination?

[fol. 352] The Court: Unless it is otherwise admissible.

Mr. McMahon: Very well, the defendant offers in evidence Defendant's Exhibits A, B, C, D and E as identified by this witness.

Mr. Long: Now we object to them because it is not proper cross examination. Second, because outside of the Parsons Patent, the chains for which taxes are assessed and which the demand is made for the refund during this period were not manufactured under any of these patents except the Parsons patent. I don't know as to these other patents. We never had a chance to examine them.

Mr. Long: We make the objection as to all of them except the Parsons Patent and if necessary we desire to ask some preliminary questions of the witness.

The Court: Objection sustained.

Mr. McMahon: An exception on behalf of the defendant.

Mr. Long: We don't object to Defendant's Exhibit B, the Parsons Patent on any ground.

Mr. McMahon: The defendant excepts to the exclusion of Defendant's Exhibits A, C, D and E.

The Court: The exhibits so excluded will be marked for identification only."

VI

The Court erred in sustaining plaintiff's objection to the following question (B/E 9), and in not permitting William Thomas Morris, the witness, to answer.

[fol. 353] "Q. I hand you what has been marked Defendant's Exhibit A for identification and ask you to state if that exhibit marked for identification, covers the Weed patent——

Mr. Long: Now, we object to that because——

Q. Let me finish—covered the chains which you assembled with your own hands when you first began to work for the Weed Tire Chain Company?

The Court: How is that material?

Mr. McMahon: It is coming down the line.

Mr. Long: We object to it for same reasons given before. It is not proper cross examination and is immaterial, incompetent, and irrelevant to any of the issues in this case, covering chains manufactured and sold during the taxable period.

Mr. Long: On examination in chief I didn't ask you what the patent was.

The Court: I will sustain the objection to the pending question.

Mr. McMahon: Note an exception."

VII

The Court erred in sustaining plaintiff's objection to the following question (B/E 10), in not permitting William Thomas Morris, the witness to answer.

"Q. Were the differences covering the chains in construction covered by patents covering an improvement in [fol. 354] the art of manufacture as compared to the chains which you manufactured during the taxable periods?

Mr. Long: We object to that as being immaterial, incompetent, and irrelevant and having no relation to the issues involved in this case as well as not being proper cross examination.

The Court: Sustained.

Mr. McMahon: Note an exception."

VIII

The Court erred in overruling defendant's motion to strike the testimony of plaintiff's witness, F. B. Baker (B/E 11, 12, 13), covering the use of tire chains throughout the country:

"Mr. McMahon: I move to strike out the testimony of this witness covering the use of tire chains throughout the country.

The Court: Denied.

Mr. McMahon: Note an exception.

The Court: Exception noted."

IX

The Court erred in overruling defendant's objection to the following question (B/E 16) and in permitting the witness, Henry H. Heitmann, to answer:

"Q. Did these chains function as well on both vehicles or on one vehicle as on the other?

[fol. 355] Mr. McMahon: The Government interposes an objection to the question for the reason it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes the facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

Mr. Swindler: Your Honor, this witness is qualified to testify to the use of these chains both in an automobile, as alleged by the Government, and upon the fire apparatus.

The Court: I think he is. I will rule that way.

Mr. McMahon: The defendant, in this connection wishes to call the Court's attention to the fact that he is asking the witness, not if they used it, but if it functioned just as well.

The Court: This witness is qualified to answer. He is chief of the fire department and if he can't testify as to the operation of the apparatus under which he has charge I don't know who can.

Mr. McMahon: Do I understand that the question goes only to the matter of operation of the apparatus or do I understand that the question of function there applies to the question of design or the question of adaptability.

Mr. Swindler: The question speaks for itself.

The Court: I don't know what counsel understands by [fol. 356] the questions—if he will explain it to the Court. (Question read by reporter.)

Mr. McMahon: Note an exception.

A. They function very good on both touring cars and the apparatus."

X

The Court erred in overruling defendant's motion to strike the answer of the witness to the following question (B/E 17). and in permitting the witness, Henry H. Heitmann, to answer:

"Q. Did they function equally as well?

A. Equally as well.

Mr. McMahon: The government objects to the answer because it has not had an opportunity to interpose an objection. I move to strike the answer of the witness for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion of the witness, assumes facts to be true not shown by the evidence and usurps the power of the jury.

The Court: Motion denied.

Mr. McMahon: Note an exception to the ruling of the Court."

XI

The Court erred in overruling defendant's objection to the following question (B/E 18) and in permitting the witness, Henry A. Steeves, to answer:

[fol. 357] "Q. Mr. Steeves, can you state whether or not Weed Chains are generally and commonly used on tractors in the vicinity of Somersville, Mass.?

Mr. McMahon: The Government interposes an objection to that question because it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent, not the best evidence and usurps the power of the jury.

Mr. Swindler: Your Honor, we have a witness here that is in the business of selling these. It must be part of his business to ascertain the demands of his trade—his cus-

tomers. He testified he has sold these chains. He must be qualified, I think, to testify to the general common use of these chains for tractors.

The Court: I think he may answer. Objection overruled.

Mr. McMahon: Note an exception.

A. Yes."

XII

The Court erred in sustaining plaintiff's objection and motion to strike the following question (B/E 18) and in striking the answer of the witness, Henry A. Steeves:

"Q. Do your duties take you about the country in your official capacity in connection with your occupation with this auto concern?

A. No, sir.

[fol. 358] Mr. Swindler: I object to that as improper cross examination.

The Court: Do you press your objection?

Mr. Swindler: I do.

The Court: It has been answered. Do you move to strike it out?

Mr. Swindler: I move to strike the answer of the witness as an answer to improper cross examination.

The Court: Motion granted.

Mr. McMahon: Note an exception."

XIII

The Court erred in overruling defendant's objection to the following question (B/E) and in permitting the witness, Maurice Welter, to answer:

"Q. Did the chains on the Snow Fighter that you operated perform the identical function as the chains on your automobile?

Mr. McMahon: The defendant objects to the question because it calls for the conclusion of the witness, the witness is not qualified to answer. It assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: Admitted.

Mr. McMahon: Note our exception.

A. They did. These chains that we bought fitted the tire and were satisfactory."

[fol. 359]

XIV

The Court erred in overruling defendant's objection to the following question (B/E 56) and in permitting the witness, Arthur C. Storz, to answer:

"Q. Were the Weed Chains manufactured and sold by the American Chain Company, on which the taxes in these suits were paid, interchangeable for use on automobiles, trucks, tractors, fire apparatus and road equipment?

Mr. McMahon: The Government interposes an objection to that question for the reason that it calls for a conclusion of the witness; the witness has not shown himself qualified to answer; it usurps the power of the jury; it usurps the power of the Court, and no proper foundation has been laid. We press the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. Yes, sir."

XV

The Court erred in overruling defendant's objection to the following question (B/E 68) and in permitting the witness, William D. Kirkpatrick, to answer:

"Q. You may state whether or not a chain of appropriate [fol. 360] size that will fit on an automobile or a truck could be used on a fire apparatus or road equipment equally as well.

Mr. McMahon: The defendant objects to the question because it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. Yes, sir."

XVI

The Court erred in overruling defendant's objection to the following question (B/E 69) and in permitting the witness, William D. Kirkpatrick, to answer:

"Q. Did the American Chain Company design and did you sell in your district during the taxable period Weed Chains for automobiles that differed in any respect from similar chains designated and used for tractors, road machines and fire apparatus?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

[fol. 361]

The Court: Overruled.

Mr. McMahon: An exception.

The Court: Exception.

A. No, sir."

XVII

The Court erred in overruling defendant's objection to the following question (B/E 72) and in permitting the witness, William D. Kirkpatrick, to answer:

"Q. Did the American Chain Company design and manufacture during the taxable period and did you sell in your district during that period Weed chains that were especially designed for use on trucks?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

Mr. Long: That is a different question, your Honor, from what we asked before in which objection was made. It omits the primary adapter and is confined to the taxable period.

The Court: It may be answered.

Mr. McMahon: Note an exception.

A. No, sir."

[fol. 362] XVIII

The Court erred in overruling defendant's objection to and motion to strike the answer of the witness to the following question (B/E 75) and in permitting the witness, William E. Wissler, to answer:

"Q. Was there any peculiar characteristics about a Weed chain during that taxable period that prevented it from being sold for general use as a commercial commodity, and which made it primarily adapted only for use as a component part of a privately owned automobile or truck?

Mr. McMahon: The government interposes an objection for the reason that no proper foundation has been laid, the witness has not shown himself qualified to answer, it calls for the conclusion of the witness, and assumes facts to be true not shown by the evidence and usurps the power of the jury and the Court. We press the objection as stated.

The Court: Overruled. Admitted.

Mr. McMahon: Note an exception.

The Witness: Will you read the question please?

(Question read.)

A. No, there was not.

Mr. McMahon: The Government moves to strike out the answer of the witness on the ground that it is usurping the power of the jury and that it states a conclusion and usurps the power of the Court.

The Court: Motion denied.

Mr. McMahon: Note an exception."

[fol. 363] XIX

The Court erred in overruling defendant's objection to the following question (B/E 91) and in permitting the witness, George B. Kutz, to answer:

"Q. Was there any peculiar characteristics about a Weed chain sold by you during the taxable period that prevented it from being sold for general use as a 'Commercial Commodity'?

Mr. McMahon: The Government interposes an objection to that question for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion

of the witness and assumes facts to be true which have not been shown by the evidence. We press the objection as stated.

The Court: Overruled.

Mr. McMahon: Exception.

The Witness: May I have that question please?

(Question read.)

A. No, sir."

XX

The Court erred in overruling defendant's objection to the following question (B/E 91) and in permitting the witness, George B. Kutz, to answer:

"Q. Was there any peculiar characteristics about a Weed chain sold by you during the taxable period which made it [fol. 364] primarily adapted only for use as a component part of a privately owned automobile or truck?

Mr. McMahon: The government interposes an objection to the question for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion of the witness, and the evidence shows chains were primarily designed and adapted for use on automobiles and trucks prior to the advent of tractors. The Government presses the objection.

The Court: Overruled.

Mr. McMahon: Note an exception.

(Question read.)

A. No."

XXI

The Court erred in overruling defendant's objection to the following question (B/K 108) and in permitting the witness, Harry O. Mainzinger, to answer:

"Q. Have Weed chains for use on trucks any peculiar characteristics with respect to general design, which are not identical with Weed chains for use on tractors?

Mr. McMahon: The Government objects to that question for the reason no proper foundation has been laid, the witness has not shown himself qualified to answer, it calls for the conclusion of the witness. It assumes facts to be true

which have not been shown by the evidence. We press the objection.

[fol. 365] The Court: Overruled.

Mr. McMahon: Note an exception.

"A. No."

XXII

The Court erred in overruling defendant's objection to the following question (B/E 108) and in permitting the witness, Harry O. Mainzinger, to answer:

"Q. Was there any peculiar characteristic about Weed chains sold during the taxable period that made them ordinarily unsuitable for sale and general use as a commercial commodity?

Mr. McMahon: The Government interposes an objection to that question for the reason no proper foundation has been laid. The witness has not shown himself qualified to answer, it calls for the conclusion of the witness and assumes facts to be true which have not been shown by the evidence. The Government presses the objection.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. No."

XXIII

The Court erred in overruling defendant's objection to the following question (B/E 111) and in not permitting the witness, Harry O. Mainzinger, to answer:

[fol. 366] "Q. As a matter of fact, is not the chief use of chains on or in connection with automobiles and trucks?

Mr. Long: Plaintiff objects to that question because it calls for an irrelevant, incompetent and immaterial answer, seeking to show the chief use of these claims. We press the objection.

The Court: Sustained.

Mr. McMahon: Note an exception.

XXIV

The Court erred in overruling defendant's objection to the following question (B/E 113) and in permitting the witness, Walter M. Cusack, to answer:

"Q. Can a Weed chain of suitable size be used just as well on a tractor as on a truck, provided the tractor has rubber tires?

Mr. McMahon: The Government interposes an objection for the reason that it calls for the conclusion of the witness, the witness is not shown to be qualified to answer, and it assumes facts to be true not shown by the evidence. The Government presses the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. Yes."

XXV

The Court erred in overruling defendant's objection to the following question (B/E 131) and in permitting the [fol. 367] witness, William C. Ettershank, to answer:

"Q. Will you state whether or not any part of the excise tax involved in these suits was ever collected directly or indirectly from the purchasers of the chains sold during the taxable period?

Mr. McMahon: The Government interposes an objection to the question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: How do you claim this is material under the issues.

Mr. Swindler: If your Honor please, it has been held in the Boyle Valve Company v. United States, a case in the Court of Claims, as well as the Jefferson Electric Company in that Court, and more lately, in November of 1930, I believe by the Federal District Court of Indiana, sitting at Indianapolis, that this question as to whether the tax is directly or indirectly collected from the purchaser is in issue, that it should be covered by proof before the Court in an action such as we have here for the recovery of excise taxes. Under those authorities we tender this evidence and feel that our tender should be accepted.

The Court: To what paragraph of the complaint does that apply?

[fol. 368] Mr. Day: Paragraph five, your Honor.

The Court: Have you the Section there, as to that?

Mr. McMahon: Yes, your Honor. The Willard storage Battery decision. This paragraph as to that decision covers it.

The Court: 424?

Mr. McMahon: Subdivision two of Section 424.

The Court: If I understand the contentions of opposing counsel correctly, it has been established satisfactorily that the Commissioner of Internal Revenue is vested with sole jurisdiction to pass on the issues that might be raised under subdivision two of section 424?

Mr. Swindler: I have not yet called the Court's attention to the ruling of Judge Thomas, of this jurisdiction, denying that contention for purposes, I believe, that are material at present.

Mr. McMahon: I might say your Honor, that since Judge Thomas' decision, this Willard decision has been made (above objection read).

The Court: Objection overruled.

Mr. McMahon: Note an exception. If the Court please, for the purpose of preserving the record, we would like to have the record show that this same objection should be written out by the reporter to each question asked the witness, calling for evidence as to whether or not this tax was passed on directly or indirectly, in order to avoid confusion.

[fol. 369] Mr. Cohen: I think it would be well, if the Court please, that this shows that the exception on this point is granted to each of the three cases which are being tried as this is a very important point.

Mr. McMahon: We have no objection to the record showing that.

Mr. Long: You do not have to repeat it again. The stenographer will insert it.

Mr. McMahon: That is it.

(Question read by reporter.)

A. It was not."

XXVI

The Court erred in overruling defendant's objection to the offer of Plaintiff's Exhibit 52 (B/E 141-143), as identi-

fied and prepared by plaintiff's witness, William C. Ettershank, as follows:

"Mr. Day: Now we offer this exhibit.

Mr. McMahon: The Government objects to the offer of Plaintiff's Exhibit Number 52 (for identification), as not the best evidence obtainable; that it does not reflect the sales accurately by month; constitutes reconstructed tax figures by the percentage method and shows a portion of the tax paid on a 1/21st basis. The evidence of specific sizes sold in each month is not in issue and the provisions of Section 424 of the Revenue Act of 1928 precludes recovery regardless of the non-taxable claims of the plaintiff. Under the pleadings in issue made in this case, the question of [fol. 370] recovery on specific sizes of chains sold, is not in issue and under the provisions of Section 424 of the Revenue Act of 1928, there are vested certain discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review.

Mr. Day: May it appear, for the record, Mr. McMahon, that the representatives of the Government have had opportunity to examine the originals from which these exhibits have been compiled?

Mr. Max E. Hoyt, representing the Bureau of Internal Revenue: Your Honor we made a spot check of certain months and portions of periods from sales invoices which the company had and did the same with some of their control cards and I think we have thoroughly familiarized ourselves with the method or methods which they have used in reconstructing this tax and while there are of course, small discrepancies, in the figures, I am authorized to accept those figures tentatively, subject to the approval of the Commissioner of Internal Revenue.

The Court: I understand then, that the Government has had an opportunity to examine the original records of the company from which this compilation is made?

Mr. McMahon: If the Court please, that is the distinguishing feature existing between the original records and the records from which this compilation is made. That is the reason for the difficulty in answering your question. [fol. 371] If you limit the question to the qu-stion of records from which the compilation is made——

The Court: Have the gentlemen had opportunity to examine such of the records of the plaintiff as they desire in this case? Has the defendant had this opportunity?

Mr. Hoyt: We have.

The Court: I will overrule the objection except in so far as it is based on the claim that the compilation offered is in turn based on the matter of expenditures. I confess that the evidence is in such a state that I feel unable to make a final ruling on that part of it, and the Court would suggest that, if they can do so, counsel explain more fully, through the witness, the features of the compilation to which that particular objection is directed.

Mr. McMahon: Note an exception."

XXVII

The Court erred in overruling defendant's objection to the offer of Plaintiff's Exhibit 52 (B/E 145-147), as identified and prepared by plaintiff's witness, William C. Ettershank, and in admitting such exhibit in evidence, as follows:

"Mr. Day: We renew our offer now.

Mr. McMahon: The same objection.

The Court: May I confer with counsel (conference held)?

Mr. Day: That is all.

The Court: Do you renew your offer?

[fol. 372] Mr. Day: Yes.

Mr. McMahon: The defendant renews its same objection.

The Court: The question is of such importance that since we have come to the time for recess, I think I will consider it over recess.

(Court reconvened and witness examination continued B/E 146, 147.)

The Court: Any further questions?

Mr. Day: No.

The Court: I will overrule the objection.

Mr. McMahon: Note an exception.

The Court: An exception.

Plaintiff's Exhibit No. 52 (for identification) laid in evidence as a full exhibit."

XXVIII

The Court erred in overruling defendant's objection to the offer of Plaintiff's Exhibit No. 53 (B/E 151), as prepared by plaintiff's witness, William C. Ettershank, and in admitting such exhibit in evidence as follows:

"Mr. Day: Your Honor, Mr. McMahon has no objection so far as identification is concerned to Plaintiff's Exhibit 53. This is a recapitulation of these figures on each of the sizes with the interest computed from the last payment day up to October 27. That is simply for the purpose of showing the jury on each size the amount plus the interest with the date from which it was computed, and in each of these periods. Take, for instance, the first period, which [fol. 373] would be from June 30, 1922 to January 1, 1924, all payments were made monthly. That is the shipment of July would be paid on or before the last day of August. In computing the interest, we have computed all our interest from the last interest date of payment, which would be January 31, 1923, so that is all in favor of the Government, and I understand Mr. Hoyt says, so far as the last day method of computing interest is concerned, there is no question about it, therefore, I offer Plaintiff's Exhibit 53—recapitulation of figures on each size of chain sold during the taxable period with interest computed thereon.

Mr. McMahon: The Government interposes the same objection to the offer of this exhibit as it interposed to the offer of Exhibit 52.

The Court: Same ruling, admitted.

Mr. McMahon: Note an exception."

XXIX

The Court erred in overruling defendant's motions to dismiss each of the cases, Nos. 3360, 3371 and 3421 (B/E 151, 152), made at the close of plaintiff's evidence, on each of the grounds set forth in such motions, as follows:

"Mr. Day: We have nothing more to offer. We rest.

Mr. McMahon: The defendant renews its motion to dismiss, heretofore made in this case, and moves the Court [fol. 374] to dismiss each of the cases, numbers 3360, 3371 and 3421, on each of the following grounds:

1. The provisions of Section 424 of the Revenue Act of 1928 deprive the plaintiff of its privilege of refund in each of these cases, for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921.

2. The provisions of Section 424 of the Revenue Act of 1928 deprive the plaintiff of its privilege of instituting and maintaining each of these actions for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921 subsequent to May 29, 1928, the effective date of such act. 3. The provisions of Section 424 of the Revenue Act of 1928 vest certain specified discretionary powers in the Commissioner of Internal Revenue, which this court is without jurisdiction to determine or review. 4. The provisions of Section 424(a) (1) of the Revenue Act of 1928 limit the jurisdiction of this court to hear and determine the issues in each of these actions for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928. 5. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufacturer's excise tax paid or collected under the pro-[fol. 375] visions of Section 900(3) of the Revenue Act of 1921, which is exclusive of all other remedies. 6. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, regardless of the non-taxable claims of the plaintiff.

The Court: The motions are denied.

Mr. Cohen: In each case?

The Court: In each case.

Mr. McMahon: Note an exception in each case on each ground.

The Court: It may be so noted."

XXX

The Court erred in overruling defendant's motion in each case (B/E 152, 153) to exclude the testimony given by the various witnesses in these cases with reference to the

various sizes of chains, made at the close of plaintiff's evidence, as follows:

"Mr. Cohen: At this time the defendant, in each case, moves that all the testimony given by the various witnesses in these cases with reference to the various sizes of chains be excluded as being incompetent, irrelevant, and immaterial to the questions involved.

The Court: Motion denied.

Mr. Cohen: May we have an exception in each case?

The Court: An exception in each case."

[fol. 376]

XXXI

The Court erred in overruling defendant's written motions for judgment, filed in each case (B/E 163) on each of the grounds set forth in each of such motions, as appears from the record made herein, to all of which the defendant at the time duly excepted.

XXXII

The Court erred in failing to find each of the findings of fact requested by the defendant in each of the above entitled cases as set forth in defendant's request for findings of fact as appears from the record made herein, to all of which the defendant duly excepted.

XXXIII

The Court erred in failing to conclude as a matter of law, each of the conclusions of law requested by defendant in each of the above entitled cases as set forth in defendant's request for conclusions of law as appears from the record made herein, to all of which the defendant duly excepted.

XXXIV

The Court erred in finding or concluding, as shown by paragraph four of its opinion, that the plaintiff, "bring this action in its own right" for the reason that the provisions of Section 424 of the Revenue Act of 1928 deprive [fol. 377] plaintiff of its privilege of instituting and maintaining these actions.

XXXV

The Court erred in finding and concluding in paragraph six of its opinion and findings, "that the tax in question was not collected directly or indirectly from customers of plaintiff," "that the arrangement cost the customer nothing," and "that in so far as the tax was collected from the purchasers, it was wholly returned to them.

XXXVI

The Court erred in finding and concluding in paragraph eight of its opinion and findings, "that the chains generally were advertised by plaintiff for use on non-taxable vehicles as well as taxable ones," and that "of this number, however, 49 sizes, which will be listed in Schedule A, hereinafter referred to, fitted at least one type of non-taxable vehicles equally as well as any taxable vehicle; that they operated as effectively upon one class of vehicles as upon the other; that wholly without adaptation for the purposes they were interchangeable upon such vehicles of both classes as used tires of substantially the same size; that there was no differentiation either of construction or of design in the chains used on the tires of non-taxable vehicles from those used on tires of taxable vehicles."

[fol. 378]

XXXVII

The Court erred in finding and concluding in paragraph eleven of its opinion and findings, "On the subordinate facts, I conclude that the chains listed in Schedule 'A' were not primarily adapted for use on taxable vehicles, but were equally adapted for use on non-taxable vehicles."

XXXVIII

The Court erred in finding and concluding in paragraph twelve of its opinion and findings, "Although, as stated, the plaintiff did not, and necessarily could not, prove by direct evidence that any particular chain found its way to the wheel of a non-taxable vehicle, yet from the evidence that the sizes listed in Schedule 'A' were adapted for such use, and that it was common practice for all types of non-taxable vehicles generally to use such chains and, indeed, that the use of such chains was often required for the successful and efficient operation of such vehicles, I conclude

that the sizes listed in Schedule 'A' were actually used on non-taxable vehicles, and that such use was common, substantial and profitable—not exceptional or experimental only."

XXXIX

The Court erred in finding and concluding in paragraph fifteen of its opinion and findings, "the tax on the sales of each month was paid by the plaintiff on or before the last [fol. 379] day of the next succeeding month" and that "so much of the tax as was paid upon the sizes in Schedule 'A' was in each case paid not later than the last day of the month following the taxable period in question."

XL

The Court erred in finding and concluding in paragraph twenty of its opinion and findings, "In the case of American-LaFrance Fire Engine Co. v. Riordan, 6 Fed. (2d) 964, it was held that fire engines and fire apparatus were not subject to the sales tax. This decision has never been overruled and must be deemed to be the law," for the reason that decision covers "sales to states or political subdivisions thereof being taxable under the Constitution and classification of fire apparatus completely manufactured, chassis and all by the American-LaFrance Company" and does not involve fire-equipment mounted on ordinary truck or automobile chassis and fire apparatus in the hands of corporations or private individuals.

XLI

The Court erred in finding and concluding in paragraph twenty-four of its opinion and findings, "Thus it is clear that if the word denotes a class, it is not a generic class, but rather a miscellaneous array of articles which come within the connotation of the word not because of any similarity to each other but solely because they have in common a certain capacity for association," for the reason the word [fol. 380] "accessories" is a generic word and if accessories be deemed a class, including all articles that have some use on or in connection with the enumerated vehicles, then that class is most certainly a generic class composed of a miscellaneous array of articles which come within the con-

notation of the word and everything within the wide domain of physics come within the scope of that word, providing such articles have some relation to the enumerated vehicles and are primarily adapted (principally or chiefly used) for that use, even though there may have been other uses for such articles for which they are not so well (primarily) adapted.

XLII

The Court erred in finding and concluding in paragraph twenty-seven of its opinion and findings, "that a showing of a common use on non-taxable vehicles was an essential part of the plaintiff's case is indicated by another expression of the Court in its opinion in the Universal Battery case," for the reason that common use is immaterial to the issue, and the plaintiff must show the use to be a "primary adapted use," meaning chief or principal use, for some vehicle or vehicles other than the enumerated vehicles.

XLIII

The Court erred in finding and concluding in paragraph twenty-eight of its opinion and finding, "And all chains of sizes thus proved to have an actual and common use with [fol. 381] non-taxable vehicles were thereby shown to be commodities other than accessories for taxable vehicles," for the reason such use may be a diverted use and not a primarily (principal) adapted use.

XLIV

The Court erred in finding and concluding in paragraph twenty-nine of its opinion and findings, "Thus the contention of each party is too broad in that it is predicated upon the proposition that the tax falls upon a generic class which must include all or none of the chains sold," for the reason that the tax falls upon a generic class including all articles having some relation to the enumerated vehicles that are primarily (principally) adapted for that use, even though there may have been some other use for such articles for which they are not so well adapted.

XLV

The Court erred in finding and concluding in paragraph thirty of its opinion and findings, "Clearly, the design of

the manufacturer and seller—not that of the original inventor—is what the regulations intended," for the reason that the word design as used in the Regulations 47, Article 16, applies to the primary (principal) adapted use for which the article is intended to be placed.

[fol. 382] XLVI

The Court erred in finding and concluding in paragraph thirty-one of its opinion and findings, "Indeed, this contention on the part of the defendant, if generally applied, would lead to incongruous results. For example, if the argument is valid, a storage battery could not be taxable as an accessory because the basic patent for storage batteries preceded the automobile industry."

XLVII

The Court erred in finding and concluding in paragraph thirty-two of its opinion and findings, "Again the defendant argues that the question of adaptability is one which can be established only by proof of duty requirements. As to this claim, it need only be said that the Act, the Regulations, and all the reported cases contain no basis for the contention. And it is well established that the question of mechanical adaptability may be shown by pragmatic evidence that the mechanism in question does in fact function. Here there is an abundance of testimony that the identical chain used on an automobile functions equally well on a non-taxable vehicle."

XLVIII

The Court erred in finding and concluding in paragraph thirty-five of its opinion and findings, "It may, therefore, be doubted that the test of chief use has application to cases [fol. 383] under Section 900. But were it otherwise, the defendant's claim could not be sustained" and "And so it is that were the plaintiff by proving that numerous sizes of chains have 'several uses' (i. e., use on tractors, fire apparatus, road equipment, etc.) to which they are equally adapted (and hence 'perfectly applicable'), has fully negatived any possible basis which the defendant might have for claiming the applicability of this doctrine," for the reason all of those uses could have been and were shown to be "Diverted Uses."

XLIX

The Court erred in finding and concluding in paragraph thirty-six of its opinion and findings, "Obviously, the tax might have been more easily administered if the Act had provided that all chains should be taxable," for the reason that all chains primarily adapted for use on the enumerated vehicles are taxable, even though there may have been some other use for such chains for which they are not so well (primarily) adapted and the burden is on the plaintiff to show clearly that he comes within any existing exemption.

L

The Court erred in finding and concluding in paragraph forty-three of its opinion and findings, "But it is also found that they did not bear the economic burden of the tax because the manufacturer itself absorbed the burden by reducing the price of the commodity by the amount of [fol. 384] the tax. It also results that, although collected from the purchaser, the tax had been 'returned to him.' For the legal effect is the same whether the refund to the purchaser is made after the tax is 'collected' from him, or whether it is sooner made in the form of a price reduction before it is 'collected' at all."

LI

The Court erred in finding and concluding in paragraph forty-five of its opinion and findings, "Accordingly, I hold that the plaintiff here, who has borne the burden of the tax, is not by this section precluded from recovery."

LII

The Court erred in finding and concluding in paragraph forty-seven of its opinion and findings, "It thus results that the defendant's motion claiming both a lack of jurisdiction and a lack of evidence to sustain the plaintiff's burden of proof on the factual requirements of Section 424 must be denied on both grounds, and the issue of fact involved must be resolved in favor of the plaintiff."

LIII

The Court erred in finding and concluding in paragraph forty-eight of its opinion and findings, "In any event, it

should be noted that the burden of proof as to this issue was fully sustained by the plaintiff as to case No. 3371."

[fol. 385]

LIV

The Court erred in overruling defendant's written notice for judgment, filed in each of the above entitled causes, as appears of record herein, on each of the grounds set forth in such written motions for judgment, to all of which the defendant at the time duly excepted.

LV

The Court erred in concluding as a matter of law that the Weed chains manufactured and sold by plaintiff during the taxable periods, July 1922 to June 1924, inclusive, were not manufactured and sold as parts or accessories of an automobile truck, automobile wagon, other automobile or motorcycle, within the meaning of the provisions of Sections 900(3) of the Revenue Act of 1921 and 600(3) of the Revenue Act of 1924.

LVI

The Court erred in concluding as a matter of law that the plaintiff has sustained the burden of proof placed on it in each of these actions for the recovery of a tax paid or collected under the provisions of Sections 900(3) of the Revenue Act of 1921 and 600(3) of the Revenue Act of 1924.

LVII

The Court erred in concluding as a matter of law that the provisions of Section 424 of the Revenue Act of 1928 [fol. 386] do not preclude recovery of the manufacturer's excise tax paid or collected under the provisions of Sections 900(3) of the Revenue Act of 1921 and 600(3) of the Revenue Act of 1924 in these actions instituted subsequent to April 30, 1928.

LVIII

The Court erred in concluding in the forty-ninth paragraph of its opinion and findings, "It results that the plaintiff is entitled to judgment as follows: In case No. 3371, in the amount of $172,470.36 with interest from January 31, 1923; in case No. 3360 in the amount of $329,250.00

with interest from January 31, 1924; and in case No. 3421 in the amount of $98,416.41 with interest from July 31, 1924. Costs in each case to the plaintiff.

LIX

The Court erred in entering judgment in favor of the plaintiff and against the defendant in each of the above entitled causes.

LX

The Court erred in entering judgment in favor of the plaintiff and against the defendant in each of the above entitled causes, for the reason such judgments are not supported by evidence.

[fol. 387]

LXI

The Court erred in entering judgment in favor of the plaintiff and against the defendant in each of the above entitled causes, for the reason that paragraphs 1 to 49, inclusive, of its findings, conclusions and opinion are not supported by evidence.

Wherefore, appellant, defendant below, prays that said decree and judgments be reversed and that the United States District Court for the District of Connecticut be ordered to enter a decree reversing the decision and judgment of the lower court in each of the above entitled causes and for such other and further relief as may be deemed proper in the premises.

John Buckley, United States Attorney for the District of Connecticut. George H. Cohen, Assistant U. S. Attorney for the District of Connecticut.

[fol. 388] IN UNITED STATES DISTRICT COURT

Nos. 3360, 3371, 3421. Law

[Title omitted]

STIPULATION AS TO RECORD

In accordance with the general rules of this Court, it is hereby agreed that the record as presented to the Clerk by the printer may be certified by the Clerk as required

by law and the rules of the Appellate Court, as a true, full, and complete copy of the original pleadings, papers, and orders used on the trial of this cause, as set forth in the pr-ecipe for transcript without further comparison by the Clerk.

Long, Chamberlain & Nyce, by —— ——, of Counsel.

[fol. 389] Marsh, Stoddard & Day, by —— ——, of Counsel. John Buckley, United States Attorney, District of Connecticut, by —— ——, of Counsel.

(Verified by Charles Elliott Pickett, Clerk, 1932.)

[fol. 390] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 391] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 179

Argued February 10, 1933. Decided March 6, 1933

ROBERT O. EATON, Collector of Internal Revenue of the United States for the District of Connecticut, Defendant-Appellant,

v.

AMERICAN CHAIN COMPANY, a Corporation, Plaintiff-Appellee

(3 Cases)

Appeal from the District Court of the United States for the District of Connecticut

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Actions at law to recover taxes paid under duress. Judgments for plaintiff; defendant appeals. Reversed.

John Buckley, U. S. Atty., and George H. Cohen, Asst. U. S. Atty., both of Hartford, Conn., and C. M. Charest,

Gen. Counsel, Bureau of Internal Revenue, and E. F. McMahon, Sp. Atty., Bureau of Internal Revenue, both of Washington, D. C., for appellant.

Chester I. Long, Peter Q. Nyce, and Charles P. Swindler, all of Washington, D. C., and David S. Day, of Bridgeport, Conn., for appellee.

OPINION

MANTON, Circuit Judge:

These three consolidated causes resulted below in judgments for refunds of manufacturer's excise taxes, amounting to $640,508.43, paid on the manufacture and sale of Weed chains, a product of the appellee. The tax was imposed under the terms of section 900 (3) of the Revenue Act of 1921 (42 Stat. 291) and section 600 (3) of the Revenue Act of 1924 (26 U. S. C. A. § 881 note) for the periods of July, 1922, to July, 1924. The taxing statute requires a monthly return. The 1921 act provides:

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—(1) Automobile trucks and automobile wagons; * * * (2) other automobiles and motor cycles * * * except tractors; * * * (3) tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2)." * * *

The Act of 1924 (26 U. S. C. A. § 881 note) reads:

"On and after the expiration of thirty days after the enactment of this act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—(1) Automobile truck chassis and automobile wagon chassis; * * * (2) other automobile chassis and bodies and motor cycles; * * * (3) tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated

in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chassis or bodies for automobile trucks, automobile wagons, or other automobiles." * * *

Appellee manufactures Weed chains and the sales taxed were made to others than manufacturers of automobile trucks, automobiles, and motorcycles—to jobbers and distributors. The tax was imposed only where the purchaser did not indicate the purchase was being made for a non-[fol. 392] taxable use and was imposed in conformity with articles 15 and 16 of Regulation 47 promulgated by the Treasury Department. These regulations, in substance, defined accessories as articles designed to be attached to and used in connection with automotive vehicles, referred to in subdivisions (1) and (2) of each act, to add to their utility or ornamentation, and which are primarily adapted for use in connection with such vehicles whether or not essential to their operation. The Weed chains were advertised by the appellee to the public as adapted for and meeting the essential requirements of every known make of automobile and auto truck, and the Commissioner found them to be accessories. No tax was imposed by the jobber or distributor when he sold to the dealer who in turn sold to the user. The chains were patented and were designed and primarily adapted for automobile use. Later, when the automobile truck came into use, they were redesigned and adapted for use on trucks. Appellees have classified their chains as "truck chains," "Weed Regulars," and "Weed Regular Cord Chains." Some chains were usable by tractors and fire trucks; but their use was chiefly for automobiles and automobile trucks. The tax is imposed as a revenue raising measure.

It is true, if there is a doubt as to the taxpayer's liability, it should be resolved in his favor. Ameican-La France Fire Engine Co. v. Riordan, 6 F. (2d) 964, C. C. A. 2). Still, the purpose of the statutes must be given full effect, if possible, and the claim of exemption from taxation must be clear enough. Bank of Commerce v. Tenn., 161 U. S. 134, 16 S. Ct. 456, 40 L. Ed. 645 The scheme of the statute seems clear. The 1921 act and the 1924 act both show an intent by Congress to tax, first automobile trucks and automobile wagons and accessories therefor, sold on or in con-

nection therewith and with the sale thereof at a fixed rate of 3 per cent; second, other automobiles and motorcycles including the accessories sold on or in connection therewith and with the sale, except tractors, 5 per cent; and, third, it imposes the tax when the parts and accessories are sold unattached, 5 per cent. In each instance the tax is imposed upon the manufacturer or the producer of the articles enumerated. If the chains are accessories, it is clear that Congress imposed a tax upon them when sold by this manufacturer.

The patent rights secured from the United States clearly specify that the chains were adaptable for use on automobiles to prevent skidding. They were described as primarily useful for this purpose. If Congress had intended to give exemption to such an accessory to an automobile, it would have so stated as it did in the case of tractors by reference in the statute, or it would have limited the language of the statute so as to afford clearly an exemption therefor, but it used the words "parts or accessories." The use of such generic words intended, we think, that they should be given a broad signification to effectuate the purposes of the statute. Worth Bros. Co. v. Lederer, 251 U. S. 507, 40 S. Ct. 282, 64 L. Ed. 377; Forged Steel Wheel Co. v. Lewellyn, 251 U. S. 511, 40 S. Ct. 285, 64 L. Ed. 380. In Universal Battery Co. v. United States, 281 U. S. 580, 50 S. Ct. 422, 423, 74 L. Ed. 1051, speaking of the statute, the court said:

"Thus the scheme of taxation embodied in these provisions centers around the motor vehicles enumerated therein. Their sale is the principal thing that is taxed, and the sale of parts and accessories 'for' such vehicles is taxed because the parts and accessories are within the same field with the vehicles and used to the same ends."

The Supreme Court referred to Regulations 47 of the Commissioner with approval, saying:

"The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.

"This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years, and

it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but is an admissible construction. * * * We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted."

It cannot be seriously doubted that the Weed chains made under the circumstances described were designed and primarily adapted for use in automobile trucks, wagons, [fol. 393] other automobiles, and motorcycles. The testimony establishes that the Weed chains were designed, adapted, and advertised to meet the essential requirements of automotive power vehicles, and were necessary to the accomplishment of their functions. In a fixed way, they are a part of the machine, and consequently are accessory to the machine.

The court below considered forty-nine specific sizes of the appellee's production of the Weed chains and their parts, and held that their sales are exempt from the statute and that no tax should be paid. It was concluded below that the primary adaptation rule, referred to in Universal Battery Co. v. United States, supra, has no application to cases where the appellee, by evidence of subsequent untaxed resales, shows two uses, one of which is the admitted principal use on automobiles and the other is a possible exempted use even though it be a diverted use. We think such a conclusion ignores the chief or principal use as being determinative of the primary adaptation rule, referred to by the Supreme Court, and it also assumes evidence of untaxed resales for possible diverted uses, sufficient to override the primary adaptation rule. In the absence of evidence showing that such diverted uses required an article of the same design and primary adaptation as is required for the automobile truck and other motor vehicle uses, the appellee could not succeed. No effort has been made to show that the tensile strength, twisting strains, or weight of the chains was different from those used and usable on automobile trucks or other automobiles. On the contrary, the evidence supports the claim of the appellant that a chain designed and primarily adapted for use on an automobile truck may be applied and used on the wheels of a tractor having com-

parable sized rubber tires. Indeed, there is no evidence that the chains referred to by the court below had the same design or primary adaptation for use on tractors.

We therefore conclude that the chains for which the tax has been imposed were primarily adapted for use and chiefly or principally used for motor vehicles, enumerated in the statute, which were taxable, and are to be regarded as parts or accessories of such vehicles even though there has been some other use of the articles for which they are not so well adapted. Universal Battery Co. v. United States, supra.

Moreover, the burden of proof was upon the appellee to establish the invalidity of the tax. United States v. Mitchell, 271 U. S. 9, 12, 46 S. Ct. 418, 70 L. Ed. 799; United States v. Anderson, 269 U. S. 422, 46 S. Ct. 131, 70 L. Ed. 347; Union Co. v. United States (Ct. Cl.) 46 F. (2d) 717. It was incumbent upon the appellee to establish that the Weed chains were not designed or primarily adapted to use on automobile trucks, automobile wagons, other automobiles, and motorcycles. This burden required a showing that the specific chains sold and for which the tax was imposed were designed and primarily adapted for some other specific use than that of automobiles. It is not enough to show that, of the forty-nine specific sizes referred to below, at least one other vehicle might have used them. The appellee admits that the chains involved were chiefly used and adapted for use on the vehicles referred to as taxable in the statute and seeks its refund on the basis that such chains were applicable for performing certain duties such as furnishing traction only with respect to other vehicles. Such assumption does not mean that the chains were not designed nor primarily adapted for use on automobile trucks or other vehicles referred to in the statute as taxable. To succeed, the appellee should have shown by evidence adaptation for other uses. In the absence of evidence of such a showing, it was erroneous to hold that chains equally adapted for a variety of uses for traction purposes only and commonly put to such uses, one of which is on automobiles, cannot be classified as parts or accessories of such vehicles. This does not mean that the chains involved can be so classified only where they are adapted solely for use on motor vehicles and are exclusively so used. Magone v. Wiederer, 159 U. S. 555, 16 S. Ct. 122, 40 L. Ed. 258. But where the chains were sold, and are predominantly and

chiefly used, as parts or accessories of such automobile trucks, other automobiles, and motorcycles, the sales are taxable in the absence of evidence showing the chains involved were not designed and primarily adapted for such use. The appellee has failed to establish its nontaxable sales.

It is an insufficient answer to say that the appellee did not know and has no way of ascertaining the amount of the sales of chains for use on other than automobile trucks, other automobiles, and motorcycles. Perfection Gear Co. v. United States, 41 F. (2d) 561 (Ct. of Claims); Burnet v. Houston, 283 U. S. 223, 51 S. Ct. 413, 75 L. Ed. 991.

We need not consider whether the claim that section 424 [fol. 394] (a) of the Revenue Act of 1928 (26 U. S. C. A. § 2424) precludes a recovery because of the view we take that the appellant has failed to establish the right to recover back the taxes paid.

Judgments reversed.

[fol. 395] In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the courtrooms, in the Post Office building, in the city of New York, on the 13th day of March, one thousand nine hundred and thirty-three.

American Chain Company, Plaintiff-Appellee,

vs.

Robert O. Eaton, as Collector, etc., Defendant-Appellant

Three Cases

Judgment—Filed March 14, 1933.

Appeal from the District Court of the United States for the District of Connecticut

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and hereby are reversed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 396] [File endorsement omitted.]

[fols. 397–410] Petition for rehearing, covering 13 pages, filed March 20, 1933, omitted from this print. It was denied, and nothing more by order of April 6, 1933.

[fol. 411] In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 6th day of April, one thousand nine hundred and thirty-three.

[Title omitted]

Order Denying Rehearing—Filed April 7, 1933

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 412] [File endorsement omitted.]

[fol. 413] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 414] Supreme Court of the United States

Order Allowing Certiorari—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,799. U. S. Circuit Court of Appeals, Second Circuit. Term No. 196. American Chain Company, Inc., petitioner, vs. Robert O. Eaton, Collector of Internal Revenue, District of Connecticut. Petition for a writ of certiorari and exhibit thereto. Filed June 22, 1933. File No. 196, O. T., 1933.